88-327

No. .....

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1988

BUDDY ROEMER, in his capacity as Governor of the State of Louisiana; FOX McKEITHEN, in his capacity as Secretary of State of Louisiana; and JERRY M. FOWLER, in his capacity as Commissioner of Elections of the State of Louisiana,

Petitioners,

versus

RONALD CHISOM, MARIE BOOKMAN, WALTER WILLARD, MARK MORIAL, LOUISIANA VOTER REGISTRATION/EDUCATION CRUSADE, and HENRY A. DILLON, III,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

1. Did Congress intend the word "representatives" as used in the Voting Rights Act of 1965, § 2(b) as amended, 42 U.S.C. § 1973, to include judges who are selected by a state judicial electoral process?

LIST OF PARTIES

The parties to the proceedings below were:

The Petitioners:

EDWIN W. EDWARDS, in his capacity as Governor of the State of Louisiana; sub nom BUDDY ROEMER

JAMES H. BROWN, in his capacity as Secretary of the State of Louisiana; sub nom FOX McKEITHEN

JERRY M. FOWLER, in his capacity as Commissioner of Elections of the State of Louisiana

The Respondents:

RONALD CHISOM

MARIE BOOKMAN

WALTER WILLARD

MARC MORIAL

LOUISIANA VOTER REGISTRATION/ EDUCATIONAL CRUSADE

[a non-profit corporation comprised of Orleans Parish black registered voters active in voting rights issues. On information and belief, petitioners assert that this corporation has no parent, subsidiaries or affiliates.]

HENRY A. DILLON, III

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BUDDY ROEMER, in his capacity as Governor of the State of Louisiana; FOX McKEITHEN, in his capacity as Secretary of State of Louisiana; and JERRY M. FOWLER, in his capacity as Commissioner of Elections of the State of Louisiana,

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RONALD CHISOM, MARIE BOOKMAN, WALTER WILLARD, MARK MORIAL, LOUISIANA VOTER REGISTRATION/EDUCATION CRUSADE, and HENRY A. DILLON, III,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioners, BUDDY ROEMER, in his capacity as Governor of the State of Louisiana; FOX McKEITHEN, in his capacity as Secretary of State of Louisiana; and JERRY M. FOWLER, in his capacity as Commissioner of Elections of the State of Louisiana, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled proceeding on February 29, 1988. A timely application for rehearing was denied on May 27, 1988.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 839 F.2d 1056, and is reprinted in the Appendix hereto, App. 4, *infra.*

Denial of the Petition for Rehearing by the Fifth Circuit is unreported. It is reprinted in the Appendix hereto, App. 27, *infra.*

The opinion of the District Court for the Eastern District of Louisiana is reported at 659 F.Supp. 183, and is reprinted in the Appendix hereto, App. 28, *infra.*

———o———

JURISDICTION

Invoking federal jurisdiction under 28 U.S.C. §§ 1331 and 1343 and 42 U.S.C. § 1973C, respondents brought this suit in the Eastern District of Louisiana on May 1, 1986. The respondents sought declaratory and injunctive relief under 42 U.S.C. §§ 1973 and 1983, as well as 28 U.S.C. §§ 2201 and 2202. The complaint was amended on September 30th, 1986.

A motion by petitioners to dismiss for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure was filed on March 18, 1987. The district court granted the motion to dismiss on May 1, 1987, amended July 10, 1987, 659 F.Supp. 183 (E.D.La 1987). App. 28, *infra.*

On May 7, 1987, respondents appealed this dismissal to the United States Court of Appeals for the Fifth Circuit. On February 9, 1988 the dismissal decision of the district court was reversed and the case was remanded, 839 F.2d 1056 (5th Cir. 1988). App. 4, *infra.* Rehearing was denied May 27, 1988. App. 27, *infra.*

The jurisdiction of this Court to review the judgment of the Fifth Circuit is invoked under 28 U.S.C. § 1254(1).

———o———

STATUTES INVOLVED

The following constitutional and statutory provisions involved have been printed in the Appendix.

United States Statutes:

Voting Rights Act
42 U.S.C. § 1973

Louisiana Constitution:

Judicial Branch
Article 5
Sections 3 and 4

Louisiana Revised Statutes:

Supreme Court District; justices
R.S. 13:101

———o———

STATEMENT OF THE CASE

Respondents brought this suit in the United States District Court for the Eastern District of Louisiana on behalf of all black registered voters in Orleans Parish, approximately 135,000 people. The suit challenged the at-large election of two justices to the Louisiana Supreme Court from the parishes of Orleans, St. Bernard, Plaquemines and Jefferson as being in violation of the 1965 Voting Rights Act, as amended, because of alleged dilution of the voting strength of the respondents. The action was for declaratory and injunctive relief, 42 U.S.C. §§ 1973 and 1983. Jurisdiction in the district court was asserted under 28 U.S.C. §§ 1331 and 1343 as well as 42 U.S.C. § 1973C. Respondents also sought relief under 28 U.S.C. §§ 2201 and 2202. Respondents sought the division of the First Supreme Court District into two districts, one to be comprised of the parishes of Jefferson, Plaquemines and St. Bernard and the other of Orleans Parish where blacks constituted 51.6% of the registered voters.

Petitioners filed a Fed.R.Civ.P. 12(b)(6) motion to dismiss for the failure of the respondents to state a claim upon which relief could be granted. The district court agreed with petitioners' contention that it was not the intention of Congress to apply the word "representatives" in Section 2 of the Voting Rights Act, as amended, to embrace members of the judiciary. The district court drew a distinction between the impartial functions performed by the judiciary without a constituency and the functions performed by the representatives who are not expected to be impartial but rather reflective of the needs and wishes of their constituency. The district court opinion is reported at 659 F.Supp. 183 (E.D.La 1987), and printed in the Appendix. App. 28, *infra.*

The respondents appealed to the United States Court of Appeals for the Fifth Circuit, where the judgment of the district court was reversed and the case was remanded because the court concluded that section 2 does apply to the election of state court judges. *Chisom v. Edwards*, 839 F.2d 1056 (5th Cir. 1988). App. 4, *infra.*

A timely filed application for rehearing was denied on May 27, 1988. App. 27, *infra.*

REASONS FOR GRANTING THE WRIT

I

The United States Court of Appeals for the Fifth Circuit Has Decided An Important Question Of Federal Law Which Has Not Been, But Should Be, Settled By This Court

This case is one of national importance, as the judiciary selection statutes of forty-two states are affected by the decision below. Of these, thirty-six states employ a direct election process, and six states employ a retention

election process. Only eight states employ either a gubernatorial or legislative selection process. Further, the Attorney General of the United States has certified this to be a case of general public importance.[1]

There are several pending cases concerning which guidance by this Court is needed. Subsumed within the question presented is, if Section 2 of the Voting Rights Act is applicable, must the results test be applied in determining the existence of a violation? Is the results test and corresponding relief compatible with the inappropriateness of applying the one man one vote test to the judiciary? If there is a violation does it permeate the entire judicial system? If a state, such as Louisiana, chooses to change its judicial selection process from an electoral system to one of appointment and/or merit, must it preclear such a change when most of the other forty-two states that elect judges need not preclear a change?

---

[1] On remand the district court granted a preliminary injunction to prevent a scheduled election relating to a Louisiana Supreme Court First District position, the term for which expires on December 31, 1988. In his July 7, 1988 Opinion regarding the preliminary injunction, Judge Schwartz stated, in pertinent part:

> While this Court adheres to its original opinion, the Fifth Circuit has spoken; this Court is bound by the Fifth Circuit's holding, unless and until that holding is either expressly or tacitly overruled judicially by either the Fifth Circuit or the Supreme Court or legislatively by Congress.

Opinion, pages 16-17, July 7, 1988. *Ronald Chisom, et al. v. Edwin Edwards, et al,* Civil Action No. 86-4075, United States District Court for the Eastern District of Louisiana.

Upon the district court's refusal to grant a stay, an expedited appeal was perfected to the court of appeals where a stay of the preliminary injunction was granted to permit qualification to occur. Thereafter, the Fifth Circuit vacated the injunction. After this ruling the Attorney General of the United States moved to intervene in this case, asserting and certifying it to be one of general public importance. The motion was granted. The Fifth Circuit Court of Appeals issued its reasons for vacating the injunction on August 19, 1988. These reasons are reproduced in the appendix at App. 44.

Illustrative as to the need for instructive guidance from this Court are two district court cases within the Fifth Circuit reaching contrary results. In the case of *Martin v. Allain,* 658 F.Supp. 1183 (S.D.Miss. 1987), the district judge has ruled that there need be changes only in those districts where a violation is found, and that the district court will fashion the remedy. In contrast, in the case of *Clark v. Edwards,* Civil Action No. 86-435-(A) (M.D.La.), which affects all of Louisiana's district and intermediate appellate courts, the district judge has enjoined all judicial elections to these courts, even in districts where the plaintiffs presented no evidence whatsoever, and has enjoined the issuance of commissions to those who have been elected without opposition.[2] This district judge has asserted that he will turn the matter over first to the Legislature to fashion a remedy, and if it does not do so, he will fashion the remedy. This same judge has decided that a violation as proved in any judicial district will require that the entire judicial system be changed, despite the absence of violations in many other districts.[3] The *Clark* judge's position appears to be

---

[2] According to Louisiana law, an unopposed candidate is automatically elected and is to be granted a commission. The applicable statute states:

> ELECTION OF UNOPPOSED CANDIDATES FOR PUBLIC OFFICE
>
> If, after the close of the qualifying period for candidates in a primary election, the number of candidates for a public office does not exceed the number of persons to be elected to the office, the candidates for that office, or those remaining after the withdrawal of one or more candidates, are declared elected by the people, and their names shall not appear on the ballot in either the primary or the general election.

LA R.S. 18:511B.

[3] Because of my conviction that there are legally significant differences between judicial elections and legislative

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> elections, it is my view that the remedy for Section 2 violations which are produced by the judicial election system, is to change the system, not to create sub-districts within district courts. Consequently, I conceive it to be my duty, having found violations, to enjoin all district, family court and court of appeal elections until the governor of Louisiana and the Louisiana legislature have had an opportunity to make changes in the judicial election system that will avoid such violations. Hence, I decline to follow the lead of Judge Barbour in Martin v. Allain, 658 F.Supp. 1183 (S.D. Miss. 1987) in confining the remedy to those specific districts in which a violation was found.

Unreported Ruling on Motion for Preliminary Injunction, page 5, August 10, 1988. *Clark v. Edwards,* Civil Action No. 86-435(A) (M.D.La.).

The following Order was signed and filed on August 11, 1988:

> IT IS HEREBY ORDERED that the Governor, the Secretary of State, the Attorney General, and all other election officials, in their official capacities, as well as their attorneys, agents and representatives are hereby preliminarily enjoined from conducting any family court, district court, or court of appeal election which was scheduled for the October 1, 1988 (primary) and November 8, 1988 (general) elections, whether specifically enumerated or not and no certification shall issue to any candidate who qualified for any such election without opposition.
>
> Baton Rouge, Louisiana, August 11, 1988.

Unreported Order, August 11, 1988. *Clark v. Edwards,* Civil Action No. 86-435(A) (M.D.La.).

> Even though no specific Section 2 violation may exist in a particular district at this time, the system employed by the state will allow the creation of a violation, given time.
>
> The remedy is to revise the system—to cast about for alternative procedures under which black voters would have a better chance to elect judicial candidates of their choice.
>
> There are many alternatives which may be considered. This court has no preconceived notion as to what changes the Governor and the Legislature ought to make. This court

(Continued on following page)

clearly at odds with this Court's decision in *Thornburg v. Gingles,* 478 U.S. 30 (1986).

> The inquiry into the existence of vote dilution caused by submergence in a multimember district is district-specific. When considering several separate vote dilution claims in a single case, courts must not *rely* on data aggregated from all the challenged districts in concluding that racially polarized voting exists in each district.

Thornburg, 478 U.S. at 59 n. 28.

Other jurisdictions where the question presented here was, or is, at issue include:

OHIO:

> where the United States District Court, S.D.Ohio, W.D., held the Voting Rights Act to be inapplicable to the judiciary. *Mallory v. Eyrich* 666 F.Supp. 1060 (1987). On appeal the Sixth Circuit Court of Appeals reversed and held the Act applicable to the judiciary and remanded the case. *Mallory v. Eyrich,* 839 F.2d 275 (6th Cir. 1987);

ALABAMA:

> where the case of *Southern Christian Leadership Conference of Alabama, et al. v. State of Ala-*

(Continued from previous page)

> is simply convinced that the present system of electing family court, district court, and court of appeal judges in Louisiana has produced violations of Section 2 of the Voting Rights Act and that it will continue to produce violations unless it is changed.
>
> Accordingly, the preliminary injunction previously issued will be made permanent and will be expanded to enjoin all family court, district court, and court of appeal elections until revisions in the electorial[sic] process are made.

Unreported Findings of Fact and Conclusions of Law, pages 41-42, August 15, 1988. *Clark v. Edwards,* Civil Action No. 86-435 (A) (M.D.La.).

bama, et al., Civil Action No. 88D462-N, was filed on May 11, 1988 in the United States District Court for the Middle District of Alabama, Northern Division and is pending;

GEORGIA:

where the case of *Tyrone Brooks, et al. v. Glynn County, Georgia Board of Elections, et al.*, Civil Action No. CV288-146, was filed on July 18, 1988 in the United States District Court for the Southern District of Georgia, Brunswick Division and is pending;

ILLINOIS:

where the case of *Paul L. Williams, et al. v. State Board of Elections, et al.*, Civil Action No. 88C-2377, was filed on March 22, 1988 in the United States District Court for the Northern District of Illinois, Eastern Division and is pending.[4]

TEXAS:

where the case of *Rita Rangel, et al. v. Jim Mattox, et al.*, Civil Action No. B 88-053, was filed on May 24, 1988 in the United States District Court for the Southern District of Texas, Brownsville District, and the case of *League of United Latin American Citizens et al. v. William Clements, et al.*, Civil Action No. MO-88-CA-154, was filed on July 11, 1988 in the United States District Court for the Western District of Texas, Midland-Odessa Division, and are both pending.

Litigation is anticipated in several other jurisdictions, including an additional suit in Louisiana relating to city court judges.

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[4] This case affects the largest court system in the country [and perhaps the world], 201 judges, all of whom were ordered by John F. Grady, Chief Judge, to be joined as parties on August 4, 1988.

The consideration by this Court of the question presented in this petition will be of invaluable assistance to all of the federal district courts, with the exception of the states which have adopted a judiciary selection system embracing solely one of appointment, namely Delaware, Hawaii, Massachusetts, New Hampshire, New Jersey, Rhode Island, Vermont and Virginia. It would also be helpful for all of the circuit courts, with the exception of the District of Columbia Circuit, for there are from one to several states covered within each circuit where there are judicial elections or retention elections selection systems. These states by circuit are:

First Circuit	Maine
Second Circuit	Connecticut New York
Third Circuit	Pennsylvania
Fourth Circuit	Maryland North Carolina South Carolina West Virginia
Fifth Circuit	Louisiana Mississippi Texas
Sixth Circuit	Kentucky Michigan Ohio Tennessee
Seventh Circuit	Illinois Indiana Wisconsin
Eighth Circuit	Arkansas Iowa [Retention election] Minnesota Missouri [Retention election] Nebraska [Retention election] North Dakota South Dakota

Ninth Circuit	Alaska [Retention election]
	Arizona
	California
	Idaho
	Montana
	Nevada
	Oregon
	Washington
Tenth Circuit	Colorado [Retention election]
	Kansas
	New Mexico
	Oklahoma
	Utah [Retention election]
Eleventh Circuit	Alabama
	Florida
	Georgia

State Court Organization 1987—National Center for State Courts, July 1988. Selection process of appellate and trial court judges [tables 7 and 20].

If the Court does not take this case, chaos will ensue. There are already 7 states which are facing litigation that may require the restructuring of their judicial selection election systems, and it is merely a matter of time until the remaining 35 states that elect judges will be faced with similar suits. For this Court to wait until all such litigation wends its way through the lower courts will create havoc in the judicial process. The Fifth Circuit's opinion vacating the injunction in this case, App. 44 *infra,* explains at length some of the complicating factors involved in restructuring a state's judiciary. Finally, when this Court ultimately decides to take a case, it may require those states that have changed their judicial system to endure another upheaval because of this Court's ultimate ruling.

To have judicial elections enjoined throughout the United States and to have judges serving and deciding cases under a cloud of litigation will discredit the judicial process. Further, it will make it impossible for states to

add judges to handle expanded case loads and to replace judges when an existing position becomes vacant by reason of death, retirement or incapacity. It would be far better for this Court to determine now whether Section 2 applies to the judiciary, and, if so, to establish and promulgate the applicable criteria to prove a Section 2 violation involving judicial elections.

The question, though extremely serious, is not complicated. If substantially all of the forty-two states with a judiciary selection process based upon an election or a retention election, must restructure their systems to conform with the Voting Rights Act, then the sooner the legislatures of the various states may be so authoritatively informed by this Court, the better for an ultimate survival of the state court judiciary. Changes do not come about easily.

II

The Term "Representatives" Is Not A Synonym for "Elected Judicial Officials"

The term "representatives" as used in Section 2(b) of the Voting Rights Act should not be equated with "elected judicial officials," language which appears nowhere in the statute.

This Court has laid down definitive guidelines for construing language which appears in Congressional Acts.

In *Consumer Products Safety Comm'n v. GTE Sylvania*, 447 U.S. 102 (1980), the Court stated:

> We begin with the familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself.

Id. at 108. Four years later, in furtherance of this concept of construction, the Court held:

> Since it should be generally assumed that Congress expresses its purposes through the ordinary meaning of the words it uses, we have often stated that " '[a]bsent a clearly expressed legislative intention

> to the contrary, [statutory] language must ordinarily be regarded as conclusive.' "

Escondido Mut. Water Co. v. La Jolla Indians, 466 U.S. 765, 773 (1984) [Citations omitted].

In *Dickerson v. New Banner Institute, Inc.,* 460 U.S. 103 (1983), the Court said:

> [W]e state once again the obvious when we note that, in determining the scope of a statute, one is to look first at its language. . . . If the language is unambiguous, ordinarily it is to be regarded as conclusive unless there is " 'a clearly expressed legislative intent to the contrary.' "

Id. at 853 [Citations omitted].

The term "representatives" refers to those who serve a specialized constituency and whose role is to represent the needs and interests of that constituency. The term "representatives" has never been commonly accepted as including the judicial branch; indeed, the reverse is true—namely, the judicial branch always has been treated as separate and distinct from the other two representative arms of government.

A representative of a district, be it federal, state, or local, exists to serve and favor his or her constituency, while hopefully also working for the good of the governmental jurisdiction as a whole. United States representatives are expected to help get government contracts for their districts; no one, however, would expect a federal judge to uphold such a contract citing as a reason the need of his area for governmental business. State legislators are expected to seek bridges and roads for their districts; no one, however, would expect a state judge to mandate that such bridges and roads be built because the people want them. City councilmen are expected to promote drainage projects for their council districts; no one, how-

ever, would expect a city judge to require them to keep his voters happy.

Judges thus are not representatives; further, they should not be representatives. The larger the constituency, the less parochial pressures can be brought to bear. An advantage to at-large elections for judges is that judges can make the difficult decisions without undue fear of dissatisfaction in the electorate. A judge would be much less likely to vote against the residents of a neighborhood on a zoning issue if that judge was elected solely by that neighborhood. Justice ought to be identical throughout a judicial system; electing judges from neighborhoods, however, might make for a system of individualized justice currently foreign to the United States. Admittedly, many problems could be cured on appeal; however, it can be extremely difficult to reverse a detailed record of fact-finding even when the facts have been slanted. Further, the respondents here seek to make appellate districts smaller also, again lessening the number and mix of a judge's constituency.

An independent judiciary is crucial to the proper functioning of a constitutional form of government. The framers of our Constitution insulated the federal judiciary from the day-to-day whims, pressures, and reactions of other branches of government. The framers' mechanism to achieve an independent judiciary was appointment for life with the advice and consent of the Senate for Article III judges; however, constitutional jurisprudence has not suggested that elected state judges should be any less independent. Indeed, numerous constitutional rights are protected only through the existence of an independent judiciary.

The Court has long recognized that the unique position of a state judiciary (as opposed to other state officers, officials, and elected representatives) affords constitutional protections to all. For example:

1. It is the existence of an independent judicial officer (whether elected or appointed) examining requests for search warrants that protects the rights against unlawful searches and seizures. *Katz v. United States,* 389 U.S. 347 (1967); *California v. Carney,* 471 U.S. 386 (1985) (dicta).

2. It is the existence of an independent judicial officer, and that judge's review and evaluation of documents, that makes a prejudgment seizure lawful and not violative of due process rights in civil actions. *Mitchell v. W. T. Grant,* 416 U.S. 600 (1974). In *Mitchell,* the Supreme Court specifically held Louisiana's prejudgment seizure statutes constitutional because of the scrutiny of Louisiana District Court Judges.

3. The Supreme Court, in discussing Article III, Section 1's guarantee of an independent and impartial adjudication by a federal judiciary, has read prior cases as indicating that the existence of an independent judiciary "serves to protect primarily personal, rather than structural, interests." *Commodity Futures Trading Commission v. Schor,* — U.S. —, at —, 106 S.Ct. 3245, at 3256, 92 L.Ed.2d 675 at 691 (1986). Likewise, state judges protect the personal interest of the litigants, not structural interests of the State or of the electorate.

4. In paternity proceedings, the State as an entity may have one set of interests, but it is the existence of an independent judiciary that protects the rights of litigants, not any state interest perceived by members of the legislative or executive branch. *See Rivera v. Minnich,* — U.S. —, 107 S.Ct. 3001, 97 L.Ed.2d 473, 481 n. 8 (1987).

5. Local legislative and executive officials may seek to pass and enforce ordinances prohibiting the posting of signs on public property. While purely aesthetic objectives may be considered and en-

> acted by local elected officials, the enforceability and constitutionality of those laws must be ascertained by an independent judicial assessment of the substantiality of the government's interest and by a court's scrutiny of aesthetics-based restrictions on speech. *See, e.g., Members of the City Council of the City of Los Angeles v. Taxpayers' for Vincent*, 466 U.S. 789 (1984).

These are but a few examples of the importance of an independent judiciary in the range of constitutional issues that affect the life of every citizen of this country.

Congress, had it wanted specifically to include judges under Section 2(b) of the Voting Rights Act, could have done so by substituting the term "elected officials" for the term "representative"; it did not do so. In a representative form of government, such as ours, it is always true that a "representative" is an "elected official"; however, the converse is *not* always true.

The 1982 Amendment to the Voting Rights Act of 1965 added language describing those circumstances that would constitute a violation of Section 2. Section 2(b) expressly states that a violation exists when "[members of a protected class] have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice."

Representatives have a constituency which numbers in the hundreds to hundreds of thousands, to each of whom they owe fidelity and from each of whom they are likely, sooner or later, to receive correspondence or a telephone call or even perhaps a personal visit.

Judges have but one constitutency, the blindfolded lady with scales, sword and shield.

III

Louisiana's Time Honored Tradition Of Electing Its Judiciary Has Passed Justice Department Scrutiny

The statutes and laws concerning the Louisiana judicial electoral system are not, in whole or part, products of racial discrimination. Louisiana first introduced its judicial selection system 136 years ago in its 1852 Constitution, Article 64. The parishes of Orleans, St. Bernard, Plaquemines, and Jefferson have had two justices on the Louisiana Supreme Court since Louisiana's 1879 Constitution Article 82, adopted 109 years ago. *See* 1898 Constitution Article 87; 1913 Constitution Article 87; 1921 Constitution Article 7 § 9; 1974 Constitution Article 5, § 4.

The 1974 Constitution, Article 14, § 16, relegated the listing of districts formerly in Article 7, § 9 of the 1921 Constitution to the statutes. This statute is LA. R.S. 13:101.

The 1974 Constitution was precleared by the Justice Department of the United States of America on November 26, 1974 [thus after the adoption of the Voting Rights Act] except for Article 8 § 10B, which was subsequently precleared on June 6, 1983 [thus after the 1982 amendment to the Voting Rights Act].

In Orleans Parish blacks have always had the opportunity of voting for the candidates of their choice. In 1972 both positions on the Louisiana Supreme Court for the First Supreme Court District were vacant. Two blacks, Judge Ortique and a Mr. Amadee, ran for election, one for each of the seats, with the following results:

	Total	*Orleans*
Ortique	27,326	21,224
Calogero	66,411	33,700
Redmann	21,865	10,240
Sarpy	74,320	34,011

	Total	*Orleans*
Amedee	11,722	8,847
Marcus	78,520	47,725
Bossetta	35,267	19,115
Garrison	51,286	25,437
Samuel	25,659	6,042

New Orleans Times-Picayune, August 21, 1972 (on file in the Louisiana Supreme Court Judicial Administrator's office).

Judge Ortique thus received in Orleans Parish 21.4% of the vote, and Mr. Amadee received 8.26% of the votes in Orleans Parish. In 1972 blacks represented 33.35% of the registered voters in Orleans Parish; therefore, the majority of the blacks voted for the white candidate in one race, and a substantial percentage in the other.

IV

This Court's Decisions Make Clear That Judges Are Not, And Should Not Be, Representatives

The Supreme Court's use of the word "representatives" over the years shows that the Court considers the term to refer to legislators or administrators as opposed to judges. For example, in *Davis v. Bandemer,* 478 U.S. 109 (1986), the Court used the terms "representative" and "legislator" interchangeably:

> Rather, it is that one electoral district elects a single *representative* and another district of the same size elects two or more—the elector's vote in the former district having less weight in the sense that he may vote for and his district be represented by only one *legislator,* while his neighbor in the adjoining district votes for and is represented by two or more.

Id. at 123.

Connor v. Finch, 431 U.S. 407 (1977), a voting rights case, also uses the terms interchangeably:

> The Equal Protection Clause requires that *legislative* districts be of nearly equal population, so that each person's vote may be given equal weight in the election of *representatives.*

Id. at 416; *accord, White v. Regester,* 412 U.S. 755, 764, 779 (1973).

In *Reynolds v. Sims,* 377 U.S. 533 (1964), the Court, while speaking of state legislatures, stated that those individuals elected to the legislative branch were the people's representatives:

> As long as ours is a representative form of government, and our legislatures are those instruments of government elected directly by and directly representative of the people, the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system. . . . But representative government is in essence self-government through the medium of elected representatives of the people, and each and every citizen has an inalienable right to full and effective participation in the political processes of his State's legislative bodies.

Id. at 562, 565. The Court went on to call the state legislature "the only instrument of state government directly representative of the people." *Id.* at 576; *accord, Whitcomb v. Chavis,* 403 U.S. 124, 141 (1971).

In his concurring opinion in *Dennis v. United States,* 341 U.S. 494 (1951), Justice Frankfurter flatly stated: "Courts are not representative bodies. They are not designed to be a good reflex of a democratic society." *Id.* at 517, 525 (Frankfurter, J., concurring in the judgment).

In *Avery v. Midland County,* 390 U.S. 474 (1968), another voting rights case, the Court made clear the applicability of the Equal Protection clause of the Fourteenth Amendment to local subdivisions, again using the term "representative." The Court noted that state legislators

enact many laws but do not govern countless matters of local concern, which are left to the local level to decide:

> What is more, in providing for the governments of their cities, counties, towns, and districts, the States characteristically provide for representative government—for decisionmaking at the local level by representatives elected by the people.

Id. at 481. The defendants had argued that the County Commissioners Court was not sufficiently legislative and that therefore unequal districts were permissible. The Court, however, noted that many of its functions were legislative and that the County Commissioners Court was a general governing body:

> [T]he court does have power to make a large number of decisions having a broad range of impacts on all the citizens of the county. It sets a tax rate, equalizes assessments, and issues bonds. It then prepares and adopts a budget for allocating the county's funds, and is given by statute a wide range of discretion in choosing the subjects on which to spend.

Id. at 483. Because of these general powers, the County Commissioners Court could not have unequal districts. Never is there any intimation in the opinion that a purely judicial body would be judged the same way by the Court.

In *Milwaukee v. Illinois,* 451 U.S. 304 (1981), the Court contrasted the role of the courts with that of Congress, a representative body:

> The enactment of a federal rule in an area of national concern, and the decision whether to displace state law in doing so, is generally made not by the federal judiciary, purposefully insulated from electoral pressures, but by the people through their elected representatives in Congress.

Id. at 312-13; *accord, Schweiker v. Wilson,* 450 U.S. 221, 230 (1981); *Cannon v. University of Chicago,* 441 U.S.

677, 696-97 (1979) ("it is always appropriate to assume that our elected representatives . . . know the law.").

In arguing that the Supreme Court should not invalidate a Connecticut birth control statute, Justice Stewart stated:

> It is the essence of judicial duty to subordinate our own personal views, our own ideas of what legislation is wise and what is not. If, as I should surely hope, the law before us does not reflect the standards of the people of Connecticut, the people of Connecticut can freely exercise their true Ninth and Tenth Amendment rights to persuade their elected *representatives* to repeal it.

Griswold v. Connecticut, 381 U.S. 479, 530-31 (1965) (Stewart, J., dissenting) (emphasis esupplied).

V

The Fundamental Difference Between Representatives And Members Of The Judiciary Is Deeply Rooted In This Country's History

The legal history of this nation demonstrates a clear and concise distinction as between one who is a representative of the people and one who dedicates his life to a different calling, that of the judiciary.

The idea that judges are to be "representatives" is totally foreign to American legal history. Instead, this country was founded, and has endured, on the principle of an *independent* judiciary free of the sort of constituent pressures on, and parochial viewpoints required of, legislators.

The history of the American judiciary was traced by Professor G. Edward White in *The American Judicial*

Tradition.[5] Professor White began by stating that during colonial times judges "were agents of the provincial government" with "a wide range of petty powers but of little independence." *Judicial Tradition* 7.

Beginning with Chief Justice John Marshall, the American judicial tradition emerged. A core element of that tradition has always included "a measure of true independence and autonomy for the appellate judiciary from the other two branches of government." *Judicial Tradition* 9. Professor White summarized Chief Justice Marshall's views concerning the judiciary as follows:

> An independent judiciary was logically the ultimate necessity in Marshall's jurisprudence, the culmination of his beliefs about law and government. He sought to show that judicial independence as not merely a side effect of federalism but a first principle of American civilization. . . . Against the potential chaos attendant on mass participatory democracy, republicans erected the institutional buffers of legislative representatives and an independent judiciary. The excesses of the people were moderated by representation, a process by which their passionate demands were reformulated by an enlightened and reasonable class of public servants. The need of the populace for an articulation of their individual rights under law was met by the presence of a body of judges not beholden to the masses in any immediate, partisan sense.

Judicial Tradition 18, 20.

Chief Justice Marshall's vision of the American judicial tradition was not unique. Alexander Hamilton "envisaged judicial review as an exercise in politics through which an independent judicial elite could temper the dem-

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[5] Citations are hereinafter abbreviated as *Judicial Tradition*. Page references refer to the 1978 Oxford University Press paperback edition.

ocratic excesses of legislatures by affirming the republican political balances inherent in the Constitution." *Judicial Tradition* 24. Some among the Founding Fathers thought an independent judiciary necessary because "even a government made up of the people's representatives was not a sufficient buffer against the excesses of the mob." *Judicial Tradition* 320.

This American judicial tradition has not been applicable only to the federal judiciary. Professor White commented that the state constitutions "were patterned on the federal Constitution, with its tripartite division of powers." *Judicial Tradition* 109. James Kent, Chief Judge of the New York Supreme Court and later Chancellor of New York, "viewed the judiciary as a buffer between established wealth and the excessively democratic legislature." *Judicial Tradition* 112. Much more recently, Roger Traynor, Chief Justice of the California Supreme Court, wrote that judges "enjoyed a 'freedom from political and personal pressures and from adversary bias' [and that] [t]heir 'environment for work' was 'independent and analytically objective.' " *Judicial Tradition* 296, quoting Traynor, "Badlands in an Appellate Judge's Realm of Reasons," 7 Utah L. Rev. 157, 167, 168 (1960).

Professor White traced "modern liberalism" trends throughout the Twentieth Century. According to this political theory, judges "were not, by and large, representatives of the people, and their nonpartisan status insulated them from the waves of current opinion." *Judicial Tradition* 320. Legislatures on the other hand "were 'representative of popular opinion' and could 'canvass a wide spectrum of views.' " *Judicial Tradition* 322. One

Twentieth Century Justice, Felix Frankfurter, has called the judiciary the "antidemocratic, unrepresentative" branch of government." *Judicial Tradition* 367.[6]

Legal theorists have also stated that judges are not "representatives." Perhaps the most provocative book to appear on judicial review during the last few years is *Democracy and Distrust* by Professor John Hart Ely.[7] Professor Ely contrasts the role of the courts with the role of the *representative* branch of government, the legislative branch. He sought an approach to judicial review "not hopelessly inconsistent with our nation's commitment to representative democracy." *Democracy and Distrust* 41. In his book, Professor Ely developed a representation-reinforcing theory of judicial review in which the non-representative branch, the judiciary, would review legislation to review the motivation of the representative branch, the legislature, to make sure that the views of all groups were represented in lawmaking. He concluded by stating that "constitutional law appropriately exists for those situations where representative government cannot be trusted." *Democracy and Distrust* 183.

Professor Alexander Bickel spoke of the importance of judicial independence in *The Supreme Court and the Idea of Progress*:[8]

> The restraints of reason tend to ensure also the independence of the judge, to liberate him from the de-

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[6] Professor Lawrence Friedman also has written about the history of a strong, independent judiciary in the federal system and in state systems. L. Friedman, *A History of American Law* 116, 118 (Simon & Schuster 1973 paperback edition).

[7] Page references are to the 1980 Harvard University Press hardbound edition.

[8] Citations are hereinafter abbreviated as *Supreme Court and Progress*. Page references refer to the 1978 Yale University Press paperback edition.

> mands and fears—dogmatic, arbitrary, irrational, self- or group-centered—that so often enchain other public officials. They make it possible for the judge, on some occasions, at any rate, to oppose against the will and faith of others, not merely his own will or deeply-felt faith, but a method of reaching judgments that may command the allegiance, on a second thought even of those who find a result disagreeable. The judge is thus buttressed against the world, but what is perhaps more significant and certain, against himself, against his own uatural tendency to give way before waves of feeling and opinion that may be as momentary as they are momentarily overwhelming. . . .
>
> The independence of the judges is an absolute requirement if individual justice is to be done, if a society is to ensure that individuals will be dealt with in accordance with duly enacted policies of the society, not by the whim of officials or of mobs, and dealt with evenhandedly, under rules that would apply also to others similarly situated, no matter who they might be.

Supreme Court and Progress 82, 84.

Professor Bickel contrasted the Court on the one hand with the people and its representatives on the other, stating, "Virtually all important decisions of the Supreme Court are the beginnings of conversations between the Court and the people and their representatives." *Supreme Court and Progress* 91.

Supreme Court and Progress also contains much material on reapportionment. *Supreme Court and Progress* 35, 158-59, 168-73. Never in that discussion is there any intimation that redistricting of the courts ought to be considered. That notion would run counter to his strong argument for judicial independence.

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CONCLUSION

This Court has always recognized the importance of an independent judiciary. This Court has held that, "There can, of course, be no disagreement among us as to the imperative need for total and absolute independence of judges in deciding cases or in any phase of the decisional function." *Chandler v. Judicial Council,* 398 U.S. 74, 84 (1970). In a dissent in the same case, Justice Douglas stated, "An independent judiciary is one of this Nation's outstanding characteristics." *Id.* at 136 (Douglas, J., dissenting).

A quarter of a century ago this Court declared, "Legislators represent people, not trees or acres." *Reynolds v. Sims,* 377 U.S. 533, 562 (1964). Judges, on the other hand, must consider the interests of people and of trees (as well as snail darters, *see Tennessee Valley Authority v. Hill,* 437 U.S. 153 (1978)). Unlike legislators, judges are not "instruments of government elected directly by and directly representative of the people." 377 U.S. at 562. Making judges representatives would do violence to (and perhaps destroy) the American concept of an independent judiciary.

For the foregoing reasons, a writ of certiorari should, therefore, be granted to review and ultimately reverse the decision below.

All of the above and foregoing is thus respectfully submitted.

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42 § 1973. Denial or abridgement of right to vote on account of race or color through voting qualifications or prerequisites; establishment of violation

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.

(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided,* That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

Louisiana Constitution

Article 5. Judicial Branch

Section 3. Supreme Court; Composition; Judgments; Terms

Section 3. The supreme court shall be composed of a chief justice and six associate justices, four of whom must concur to render judgment. The term of a supreme court judge shall be ten years.

Section 4. Supreme Court; Districts

Section 4. The state shall be divided into at least six supreme court districts, and at least one judge shall be elected from each. The districts and the number of judges assigned to each on the effective date of this constitution are retained, subject to change by law enacted by two-thirds of the elected members of each house of the legislature.

Louisiana Revised Statutes

R.S. 13:101 Supreme court district; justices

The state shall be divided into six supreme court districts and the supreme court shall be composed of justices from the said districts as set forth below:

(1) First district. The parishes of Orleans, St. Bernard, Plaquemines, and Jefferson shall compose the first district, from which two justices shall be elected.

(2) Second district. The parishes of Caddo, Bossier, Webster, Claiborne, Bienville, Natchitoches, Red River, DeSoto, Winn, Vernon, and Sabine shall compose the second district, from which one justice shall be elected.

(3) Third district. The parishes of Rapides, Grant, Avoyelles, Lafayette, Evangeline, Allen, Beauregard, Jefferson Davis, Calcasieu, Cameron, and Acadia shall compose the third district from which one justice shall be elected.

(4) Fourth district. The parishes of Union, Lincoln, Jackson, Caldwell, Ouachita, Morehouse, Richland, Franklin, West, Carroll, East Carroll, Madison, Tensas, Concordia, LaSalle, and Catahoula shall compose the fourth district, from which one justice shall be elected.

(5) Fifth district. The parishes of East Baton Rouge, West Baton Rouge, West Feliciana, East Feliciana, St. Helena, Livingston, Tangipahoa, St. Tammany, Washington, Iberville, Pointe Coupee, and St. Landry shall compose the fifth district, from which one justice shall be elected.

(6) Sixth district. The parishes of St. Martin, St. Mary, Iberia, Terrebonne, Lafourche, Assumption, Ascension, St. John the Baptist, St. James, St. Charles, and Vermilion shall compose the sixth district from which one justice shall be elected.

App. 4

Ronald CHISOM, et al.,
Plaintiffs-Appellants,

v.

Edwin EDWARDS, in his capacity as
Governor of the State of Louisiana,
et al., Defendants-Appellees.

No. 87-3463.

United States Court of Appeals,
Fifth Circuit.

Feb. 29, 1988.

Black registered voters in Orleans Parish of Louisiana brought suit challenging constitutionality of present system of electing Louisiana Supreme Court Justices from First Supreme Court District. The United States District Court for the Eastern District of Louisiana, Charles Schwartz, Jr., J., 659 F.Supp. 183, dismissed, and voters appealed. The Court of Appeals, Johnson, Circuit Judge, held that: (1) judicial elections are covered by Voting Rights Act section which prohibits any law or procedure which has effect of denying or abridging right to vote on basis of race, and (2) complaint by black registered voters challenging current at-large system of electing state Supreme Court Justices from their district established theory of discriminatory intent and stated claim of racial discrimination under Fourteenth and Fifteenth Amendments.

Reversed and remanded.

1. Elections 12(1)

Judicial elections are covered by Voting Rights Act section which prohibits any law or procedure which has effect of denying or abridging right to vote on basis of

race. Voting Rights Act of 1965, § 2, as amended, 42 U.S.C.A. § 1973.

2. Civil Rights 13.4(6)

Elections 7

Discriminatory purpose is prerequisite to recovery under Fourteenth and Fifteenth Amendments. U.S.C.A. Const. Amends. 14, 15.

3. Civil Rights 13.12(3)

Elections 7

Complaint by black registered voters challenging current at-large system of electing state Supreme Court Justices from their district established theory of discriminatory intent and stated claim of racial discrimination under Fourteenth and Fifteenth Amendments; voters cited history of purposeful official discrimination on basis of race in state and existence of wide-spread racially polarized voting in elections involving black and white candidates, concluding that current election procedures for selecting Supreme Court Justices from their area diluted minority voting strength. U.S.C.A. Const.Amends. 14, 15.

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Appeal from the United States District Court for the Eastern District of Louisiana.

Before BROWN, JOHNSON, and HIGGINBOTHAM, Circuit Judges.

JOHNSON, Circuit Judge:

Plaintiffs, black registered voters in Orleans Parish, Louisiana, raise constitutional challenges to the present system of electing Louisiana Supreme Court Justices from the First Supreme Court District. Plaintiffs allege that the current at-large system of electing Justices from the First District impermissibly dilutes the voting strength of black voters in Orleans Parish in violation of Section 2 of the Voting Rights Act of 1965, as amended in 1982 and the fourteenth and fifteenth amendments. The district court dismissed the section 2 claim pursuant to Fed. R.Civ.P. 12(b)(6) for failure to state a claim, finding that section 2 does not apply to the election of state judges. Concluding that section 2 does so apply, we reverse.

The primary issue before this Court is whether section 2 of the Voting Rights Act applies to state judicial elections.

I. FACTS AND PROCEDURAL HISTORY

The facts are undisputed. Currently, the seven Justices on the Supreme Court of Louisiana are elected from six geographical judicial districts. Five of the six districts elect one Justice each. However, the First District, comprised of four parishes (Orleans, St. Bernard, Plaquemines, and Jefferson Parishes), elects two Justices at-large.

The population of the four parish First Supreme Court District is approximately thirty-four percent black and sixty-three percent white. The registered voter population reveals a somewhat similar percentage breakdown, with approximately thirty-two percent black and sixty-eight percent white. Over half of the four parish First Supreme Court District's population and over half of the district's registered voters live in Orleans Parish. Importantly, Orleans Parish has a fifty-five percent black population and a fifty-two percent black registered voter population. Plaintiffs seek a division of the First District into two single-member districts, each to elect one Justice. Under the plaintiffs' plan of division, one proposed district would be composed of Orleans Parish with a greater black population and black registered voter population than white. The other proposed district would be composed of Jefferson, Plaquemines, and St. Bernard Parishes; this district would have a substantially greater white population and white registered voter population than black. It is particularly significant that no black person

has ever been elected to the Louisiana Supreme Court, either from the First Supreme Court District or from any one of the other five judicial districts.

To support their voter dilution claim, plaintiffs cite, among other factors, a history of purposeful official discrimination on the basis of race in Louisiana and the existence of widespread racially polarized voting in elections involving black and white candidates. Specifically, plaintiffs allege in their complaint:

> Because of the official history of racial discrimination in Louisiana's First Supreme Court District, the wide spread prevalence of racially polarized voting in the district, the continuing effects of past discrimination on the plaintiffs, the small percentage of minorities elected to public office in the area, the absence of any blacks elected to the Louisiana Supreme Court from the First District, and the lack of any justifiable reason to continue the practice of electing two Justices at-large from the New Orleans area only, plaintiffs contend that the current election procedures for selecting Supreme Court Justices from the New Orleans area dilutes minority voting strength and therefore violates the 1965 Voting Rights Act, as amended.

On May 1, 1987, the district court, 659 F.Supp. 183, dismissed plaintiffs' complaint for failure to state a claim upon which relief may be granted. In its opinion accompanying the dismissal order, the district court concluded that section 2 of the Voting Rights Act does not apply to the election of state judges. To support this conclusion, the district court relied primarily on the amended language in section 2 which states "to elect representatives of their choice." The district court reasoned that since judges are not "representatives," judicial elections are therefore

not within the protective ambit of section 2. Focusing on a perceived inherent difference between representatives and judges, the district court stated, "[j]udges, by their very definition, do not represent voters but are 'appointed [or elected] to preside and administer the law.'" (citation omitted). The district court further relied on what was understood to be a lack of any reference to judicial elections in the legislative history of section 2, and on previous court decisions establishing that the "one person, one vote" principle does not apply to judicial elections. As to plaintiffs' fourteenth and fifteenth amendment challenges, the district court determined that plaintiffs had failed to plead an intent to discriminate with sufficient specificity to support their constitutional claims. Plaintiffs appeal the district court's dismissal of both their statutory and constitutional claims.

[1] In an opinion just released, the Sixth Circuit, addressing a complaint that the present system of electing municipal judges to the Hamilton County Municipal Court in Ohio violates section 2, concluded that section 2 does indeed apply to the judiciary. *Mallory v. Eyrich,* 839 F.2d 275 (6th Cir.1988). Other than our district court, only two district courts have ruled on the coverage of section 2 in this context. The *Mallory* district court, subsequently reversed, concluded that section 2 does not extend to the judiciary. *Mallory v. Eyrich,* 666 F.Supp. 1060 (S.D. Ohio 1987). The other district court, *Martin v. Allain,* 658 F. Supp. 1183 (S.D.Miss. 1987), determined that section 2 does apply to the judicial branch. After consideration of the language of the Act itself; the policies behind the enactment of section 2; pertinent legislative history; previous judicial interpretations of section 5, a companion sec-

tion to section 2 in the Act; and the position of the United States Attorney General on this issue; we conclude that section 2 does apply to the election of state court judges. We therefore reverse the judgment of the district court.

A. *The Plain Language of the Act*

The Voting Rights Act was enacted by Congress in 1965 for a broad remedial purpose—"to rid the country of racial discrimination in voting." *South Carolina v. Katzenbach,* 383 U.S. 301, 315, 86 S.Ct. 803, 812, 15 L.Ed.2d 769 (1966). Since the inception of the Act, the Supreme Court has consistently interpreted the Act in a manner which affords it "the broadest possible scope" in combatting racial discrimination. *Allen v. State Board of Elections,* 393 U.S. 544, 565, 89 S.Ct. 817, 831, 22 L.Ed.2d 1 (1969). As a result ,the Act effectively regulates a wide range of voting practices and procedures. *See United States v. Sheffield Board of Commissioners,* 435 U.S. 110, 122-23, 98 S.Ct. 965, 974-75, 55 L.Ed.2d 148 (1978). Referred to by the Supreme Court as a provision which "broadly prohibits the use of voting rules to abridge exercise of the franchise on racial grounds," *Katzenbach,* 383 U.S. at 316, 86 S.Ct. at 812, section 2 of the Voting Rights Act of 1965, prior to its amendment in 1982, provided as follows:

> No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title.

Congress amended section 2 in 1982 in response to the Supreme Court's decision in *Mobile v. Bolden,* 446 U.S. 55, 100 S.Ct. 1490, 64 L.Ed.2d 47 (1980), wherein the Court concluded that section 2 operated to prohibit only intentional acts of discrimination by state officials. In disagreement with the high court's pronouncement, Congress amended section 2 with language providing that proof of intent is not required to successfully prove a section 2 violation. Instead, Congress adopted the "results" test, whereby plaintiffs may prevail under section 2 by demonstrating that, under the totality of the circumstances, a challenged election law or procedure has the effect of denying or abridging the right to vote on the basis of race. However, while effecting significant change through the 1982 amendments, Congress specifically retained the operative language of original section 2 defining the section's coverage—"[n]o voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed. . . ." Section 2, as amended in 1982, now provides:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.
>
> (b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class

> of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided,* That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

Section 14(c)(1), which defines "voting" and "vote" for purposes of the Act, sets forth the types of election practices and elections which are encompassed within the regulatory sphere of the Act. Section 14(c)(1) states,

> The terms "vote" or "voting" shall include all action necessary to make a vote effective in any primary, special or general election, including, but not limited to, registration, listing pursuant to this subchapter or other action required by law prerequisite to voting, casting a ballot, and having such ballot counted properly and included in the appropriate totals of votes cast with respect to candidates for public or party office and propositions for which votes are received in an election.

Clearly, judges are "candidates for public or party office" elected in a primary, special, or general election; therefore, section 2, by its express terms, extends to state judicial elections. This truly is the only construction consistent with the plain language of the Act.[1]

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1. Evidence of congressional intent to reach all types of elections, regardless of who or what is the object of the vote, is the fact that votes on *propositions* are within the purview of the Act. Section 14(c)(1).

In *Dillard v. Crenshaw County*, 831 F.2d 246 (11th Cir.1987), the Eleventh Circuit addressed the issue of the coverage of section 2. In *Dillard*, the court rejected the defendant county's implicit argument that the election of an at-large chairperson of a county commission was not covered by section 2 due to that position's administrative, as opposed to legislative, character. The *Dillard* court stated,

> Nowhere in the language of Section 2 nor in the legislative history does Congress condition the applicability of Section 2 on the function performed by an elected official. The language is only and uncompromisingly premised on the fact of nomination or election. Thus, on the face of Section 2 it is irrelevant that the chairperson performs only administrative and executive duties. It is only relevant that Calhoun County has expressed an interest in retaining the post as an electoral position. Once a post is open to the electorate, and if it is shown that the context of that election creates a discriminatory but corrigible election practice, it must be open in a way that allows racial groups to participate equally.

Id. at 250.

The State asserts that by amending section 2 in 1982, Congress intentionally grafted a limitation on section 14(c)(1) that "candidates for public or party office" only include "representatives"; since judges are not "representatives," state judicial elections are exempt from the protective measures of the Act. In making this contention, the State, as well as the district court, points to the distinctive functions of judges as opposed to other elected officials. Specifically, the district court, citing *Wells v. Edwards*, 347 F.Supp. 453 (M.D.La. 1972), *aff'd*, 409 U.S.

1095, 93 S.Ct. 904, 34 L.Ed.2d 679 (1973), notes that the "one person, one vote" principle of apportionment has been held not to apply to the judicial branch of government on the basis of this distinction. *See also Voter Information Project v. City of Baton Rouge,* 612 F.2d 208 (5th Cir.1980). In *Wells,* the plaintiff sought reapportionment of the Louisiana Supreme Court Judicial Districts in accordance with one person, one vote principles. The *Wells* court rejected the plaintiff's claim, reasoning that the "primary purpose of one-man, one-vote apportionment is to make sure that each official member of an elected body speaks for approximately the same number of constituents." *Wells,* 347 F.Supp. at 455. The district court then concluded that since judges do not represent, but instead serve people, the rationale behind one person, one vote apportionment of preserving a representative form of government is not relevant to the judiciary. *Id.*

In *Voter Information,* this Court, bound by the holding in *Wells* due to the Supreme Court's summary affirmance of that decision, rejected the plaintiff's claim for reapportionment of judicial districts on the one person, one vote theory. *Voter Information,* 612 F.2d at 211. However, the *Voter Information* Court then emphasized that the plaintiffs further asserted claims of racial discrimination under the fifteenth amendment which resulted in the dilution of black voting strength. Recognizing the difference between the two types of claims, the Court expressly rejected the applicability of the *Wells* decision to claims of racial discrimination, stating,

> [T]he various 'one man one vote' cases involving Judges make clear that they do *not* involve claims of race discrimination as such.

> To hold that a system designed to dilute the voting strength of black citizens and prevent the election of blacks as Judges is immune from attack would be to ignore both the language and purpose of the Fourteenth and Fifteenth Amendments. The Supreme Court has frequently recognized that election schemes not otherwise subject to attack may be unconstitutional when designed and operated to discriminate against racial minorities.

Id. (footnote omitted).

We, like the *Voter Information* Court, are bound by the Supreme Court's affirmance of *Wells* and its holding that the one person, one vote principle does not extend to the judicial branch of government. However, the district court's reliance on *Wells* in the instant case is misplaced as we are not concerned with a complaint seeking reapportionment of judicial districts on the basis of population deviations between districts. Rather, the complaint in the instant case involves claims of racial discrimination resulting in vote dilution under section 2 of the Voting Rights Act and the fourteenth and fifteenth amendments. Therefore, the district court erred to the extent it relied on *Wells* in support of its conclusion that section 2 does not apply to the judiciary.[2]

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2. The distinction between equal protection principles applicable to claims based on one person, one vote principles of apportionment and those based on racial discrimination is not without prior Supreme Court precedent. *See White v. Regester*, 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973) (Court reversed decision of district court that reapportionment plan for Texas House of Representatives violated one person, one vote principles, but affirmed the district court's conclusion that a particular portion of the plan unlawfully

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The Voting Rights Act was enacted, in part, to facilitate the enforcement of the guarantees afforded by the Constitution. Indeed, section 2, as originally written, no more than elaborated on the fifteenth amendment, providing statutory protection consonant with that of the constitutional guarantee. *Mobile,* 446 U.S. at 60, 100 S.Ct. at 1496. Therefore, the reasoning utilized by the Court in *Voter Information* to extend the protection from racial discrimination provided by the fourteenth and fifteenth amendments to the judiciary compels a conclusion by this Court that the protection from racial discrimination provided by section 2 likewise extends to state judicial elections.

It is difficult, if not impossible, for this Court to conceive of Congress, in an express attempt to expand the coverage of the Voting Rights Act, to have in fact amended the Act in a manner affording minorities less protection from racial discrimination than that provided by the Constitution. We conclude today that section 2, as amended in 1982, provides protection commensurate with the fourteenth and fifteenth amendments; therefore, in accordance with this Court's decision in *Voter Information,* section 2 necessarily embraces judicial elections within its scope. Any other construction of section 2 would be whol-

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diluted minority voting strength.). *See also Gaffney v. Cummings,* 412 U.S. 735, 751, 93 S.Ct. 2321, 2330, 37 L.Ed.2d 298 (1973) ("A districting plan may create multi-member districts perfectly acceptable under equal population standards, but invidiously discriminatory because they are employed 'to minimize or cancel out the voting strength of racial or political elements of the voting population.' ") (citations omitted).

ly inconsistent with the plain language of the Act and the express purpose which Congress sought to attain in amending section 2; that is, to expand the protection of the Act.

B. *The Legislative History of Section 2*

Our conclusion today finds further support in the legislative history of the 1982 amendments to section 2. An overriding principle which guides any analysis of the legislative history behind the Voting Rights Act is that the Act must be interpreted in a broad and comprehensive manner in accordance with congressional intent to combat racial discrimination of any kind in all voting practices and procedures. Thus, in the absence of *any* legislative history warranting a conclusion that section 2 does not apply to state judicial elections, the only acceptable interpretation of the Act is that such elections are so covered. *See Sheffield*, 435 U.S. 110, 98 S.Ct. 965.[3]

As previously noted, Congress amended section 2 in direct response to the Supreme Court's decision in *Mobile v. Bolden*,

> The Senate Report states that amended [section] 2 was designed to restore the "results test"—the legal

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3. In *Sheffield*, the Supreme Court declined to adopt a narrowing construction of § 5 and the preclearance requirements of the Act whereby § 5 would cover only counties and political units that conduct voter registration. "[I]n view of the structure of the Act, it would be unthinkable to adopt the District Court's construction unless there were persuasive evidence either that § 5 was intended to apply only to changes affecting the registration process or that Congress clearly manifested an intention to restrict § 5 coverage. . . ." 435 U.S. at 122, 98 S.Ct. at 974.

> standard that governed voting discrimination cases prior to our decision in *Mobile v. Bolden*. . . . Under the "results test," plaintiffs are not required to demonstrate that the challenged electoral law or structure was designed or maintained for a discriminatory purpose.

Thornburg v. Gingles, 478 U.S. 30, 106 S.Ct. 2752, 2763 n. 8, 92 L.Ed.2d 25 (1986) (citations omitted). In amending section 2, Congress preserved the operative language of subsection (a) defining the coverage of the Act and merely added subsection (b) to adopt the "results test" for proving a violation of section 2. In fact, the language added by Congress in subsection (b)—"to participate in the political process and to elect representatives of their choice"—is derived almost verbatim from the Supreme Court's standard governing claims of vote dilution on the basis of race set forth in *White v. Regester*, 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973), prior to *Mobile v. Bolden*. *See* S.Rep.No. 417, 97th Cong., 2d Sess. 27, *reprinted in* 1982 U.S. Code Cong. & Admin. News 177, 205 (Congress' stated purpose in adding subsection (b) was to "embod[y] the test laid down by the Supreme Court in *White*."). In *White*, the Court stated "[t]he plaintiffs' burden is to produce evidence . . . that [the minority groups'] members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice." *Id.* at 766, 93 S.Ct. at 2339.[4]

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4. It might be argued that since the Supreme Court used the term "legislators" and Congress chose "representatives," Congress thereby rejected language limiting the coverage of § 2

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Further, contrary to the statement in the district court's opinion that the legislative history of the 1982 amendments does not address the issue of section 2 applying to the judiciary, Senator Orrin Hatch, in comments contained in the Senate Report, stated that the term " 'political subdivision' encompasses *all* governmental units, including city and county councils, school boards, *judicial districts,* utility districts, as well as state legislatures." S.Rep. 417 at 151, 1982 U.S.Code Cong. & Admin. News 323 (emphasis added). While the above statement by Senator Hatch is not a definitive description of the scope of the Act, we believe the statement provides persuasive evidence of congressional understanding and belief that section 2 applies to the judiciary, especially since the Report is silent as to any dissent by senators from Senator Hatch's description.

Additionally, the Senate and House hearings on the various bills regarding the extension of the Voting Rights Act in 1982 are replete with references to the election of judicial officials under the Act. The references primarily occur in the context of statistics presented to Congress indicating advances or setbacks of minorities under the Act. The statistics chart the election of minorities to various elected positions, including judges. *See Extension of the Voting Rights Act: Hearings on H.R. 1407, H.R. 1731, H.R. 2942, and H.R. 3112, H.R. 3198, H.R. 3473 and H.R. 3498 Before the Subcomm. on Civil and Constitu-*

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to legislators. The better analysis is that Congress did not use the term "representatives" with a specific intent to limit the section's application to any elected officials. Had Congress wished to do so, it could have easily promulgated express language to effectuate that intent.

tional Rights of the House Comm. on the Judiciary, 97th Cong. 1st sess. 38, 193, 239, 280, 503, 574, 804, 937, 1182, 1188, 1515, 1528, 1535, 1745, 1839, 2647 (1981); *Voting Rights Act: Hearings on S. 53, S. 1761, S. 1975, S. 1992, and H.R. 3112 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 97th Cong.2d Sess. 669, 748, 788-89 (1982). Once again, the legislative history does not reveal any dissent from the proposition that such statistics were properly considered by Congress in amending the Act. Finally, throughout the Senate Report on the 1982 amendments to section 2, Congress uses the terms "officials," "candidates," and "representatives" interchangeably when explaining the meaning and purpose of the Act. This lack of any consistent use of the term "representatives" indicates that Congress did not intentionally choose that term in an effort to exclude certain types of elected officials from the coverage of the Act.

In contrast to the examples of legislative history which plaintiffs cite in support of their position that section 2 applies to state judicial elections, the State offers no convincing evidence in the legislative history contrary to the plaintiff's interpretation of the Act. Instead, the State relies primarily on the plain meaning of the word "representative" to assert that judges are exempt from the Act. The State's position is untenable.[5] Judges, while not "rep-

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5. The State asserts that the Dole compromise prohibiting proportional representation evidences congressional intent that § 2 only apply to legislative officials. Proportional representation, the State continues, is relevant to the legislature; therefore, Congress intended § 2 to apply only to the election of legislators. However, what belies the State's argument is that

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resentatives" in the traditional sense, do indeed reflect the sentiment of the majority of the people as to the individuals they choose to entrust with the responsibility of administering the law. As the district court held in *Martin v. Allain*:

> [J]udges do not "represent" those who elect them in the same context as legislators represent their constituents. The use of the word "representatives" in Section 2 is not restricted to legislative representatives but denotes anyone selected or chosen by popular election from among a field of candidates to fill an office, including judges.

658 F.Supp. at 1200.

C. *Section 5 and Section 2*

The plaintiffs further support their position that judicial elections are covered by section 2 by citing to the recent case of *Haith v. Martin*, 618 F.Supp. 410 (E.D.N.C. 1985), *aff'd*, 477 U.S. 901, 106 S.Ct. 3268, 91 L.Ed.2d 559 (1986), wherein the district court held that judicial elections are covered by section 5 and the preclearance requirements of the Act. In *Haith*, the defendant state offi-

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proportional representation may occur in any election wherein the people elect individuals to compromise a group. For instance, Louisiana elects seven Justices to comprise the Supreme Court. Certainly, the prohibition on proportional representation in § 2(b) applies in such a situation to prevent a legal requirement that the number of blacks on the Louisiana Supreme Court correspond to the percentage of blacks in the Louisiana population. Moreover, the State conceded at oral argument that executive officials could be covered by § 2, underlying their assertion that congressional fear of proportional representation evidenced intent that § 2 only apply to the legislature.

cials sought to exempt the election of superior court judges in North Carolina from the preclearance requirements of section 5 by relying on the cases holding that the one person, one vote principle does not apply to the judicial branch of government. In an analysis strikingly similar to that employed by the Court in *Voter Information*, the district court in *Haith* rejected the defendants' arguments as misplaced due to the fact that the plaintiff's claim was one based on discrimination, not malapportionment. The *Haith* court stated "[a]s can be seen, the Act applies to all *voting* without any limitation as to who, or what, is the object of the vote." 618 F.Supp. at 413. *See also Kirksey v. Allain*, 635 F.Supp. 347, 349 (S.D.Miss.1986) ("Given the expansive interpretation of the Voting Rights Act and § 5, this Court is compelled to agree with the pronouncement in *Haith v. Martin*" that section 5 applies to the judiciary.)

In the instant case, the State argues that the Supreme Court's affirmance of *Haith* does not compel a conclusion that section 2 applies to judicial elections as section 5 involves the mechanics of voting, while section 2 involves the fundamental right to vote for those who govern. We reject this asserted distinction. If, for instance, Louisiana were to enact an election statute providing that no blacks would be able to vote in elections for Louisiana Supreme Court Justices, it is undisputed, after *Haith*, that such a statute would be invalidated under the preclearance requirements of section 5. To hold, as the State asserts, that such an egregious statute would not be subject to the requirements of section 2 as well would lead to the incongruous result that, while Louisiana could not adopt such a statute in 1988, if that statute were in effect prior to

1982, minorities could only challenge the statute under the Constitution and not the Voting Rights Act. Such a result would be totally inconsistent with the broad remedial purpose of the Act. Moreover, section 5 and section 2, virtually companion sections, operate in tandem to prohibit discriminatory practices in voting, whether those practices originate in the past, present, or future. Section 5 contains virtually identical language defining its scope to that of section 2—"any voting qualification or prerequisite to voting, or standard, practice, or proceedure with respect to voting. . . ." Therefore, statutory construction, consistency, and practicality point inexorably to the conclusion that if section 5 applies to the judiciary, section 2 must also apply to the judiciary. *See Pampanga Mills v. Trinidad*, 279 U.S. 211, 217-18, 49 S.Ct. 308, 310, 73 L.Ed. 665 (1929).

D. *The Attorney General's Interpretation*

In *United States v. Sheffield Board of Commissioners*, 435 U.S. at 131, 98 S.Ct. at 979, the Supreme Court concluded that the contemporaneous construction of the Act by the Attorney General is persuasive evidence of the original congressional understanding of the Act, "especially in light of the extensive role the Attorney General played in drafting the statute and explaining its operation to Congress." Since its inception, the Attorney General has consistently supported an expansive, not restrictive, construction of the Act. Testifying at congressional hearings prior to the passage of the Act in 1965, the Attorney General stated that "every election in which registered voters are permitted to vote would be covered" by the Act. *Voting Rights: Hearing Before Subcomm. No. 5 of*

the House Judiciary Comm., 89th Cong. 1st Sess. (1965), at 21. *See also Allen*, 393 U.S. at 566-67, 89 S.Ct. at 832-33. Continuing the trend of broadly interpreting the Act to further its remedial purpose, the Attorney General has filed an amicus curiae brief in the instant case in which he maintains that the "plain meaning of [the language in section 2] reaches all elections, including judicial elections" and that the pre-existing coverage of section 2 was not limited by the 1982 congressional amendments. This construction of the Act by the Attorney General further bolsters our holding today that section 2 does apply to state judicial elections.

E. *Plaintiffs' Constitutional Claims*

Plaintiffs also appeal the district court's dismissal of their constitutional claims for failure to plead specific discriminatory intent. In their complaint, plaintiffs allege, in pertinent part:

> The defendant's actions are in violation of the Fourteenth and Fifteenth amendments to the United States Constitution and 42 U.S.C. Section 1983 in that the purposes and effect of their actions is to dilute, minimize, and cancel the voting strength of the plaintiffs.

[2, 3] In the instant case, the district court was correct in concluding that discriminatory purpose is a prerequisite to recovery under the fourteenth and fifteenth amendments. *See Washington v. Davis*, 426 U.S. 229, 239-41, 96 S.Ct. 2040, 2047-48, 48 L.Ed.2d 597 (1976). However, the district court erred in finding that plaintiffs' complaint did not establish a theory of "discriminatory intent." In *Voter Information*, this Court held that if "plaintiffs can prove that the purpose and operative ef-

fect of such purpose" of the challenged electoral practices is to dilute minority voting strength, the plaintiffs are entitled to some form of relief. *Voter Information*, 612 F.2d at 212. When compared with the complaint in *Voter Information*, the plaintiffs' complaint in the instant case is sufficient to raise a claim of racial discrimination under the fourteenth and fifteenth amendments.[6]

III. CONCLUSION

Where racial discrimination exists, it is not confined to elections for legislative and executive officials; in such instance, it extends throughout the entire electoral spectrum. Minorities may not be prevented from using section 2 in their efforts to combat racial discrimination in the election of state judges; a contrary result would prohibit minorities from achieving an effective voice in choosing those individuals society elects to administer and interpret the law. The right to vote, the right to an effective voice in our society, cannot be impaired on the basis of race in

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6. In *Voter Information*, the plaintiffs' complaint alleged,

> 25. The sole purpose of the present at-large system of election of City Judge is to ensure that the white majority will continue to elect all white persons for the office of City Judge.
>
> 26. The present at-large system was instituted when "Division B" was created as a reaction to increasing black voter registration and for the express purpose of diluting and minimizing the effect of the increased black vote.
>
> 27. In Baton Rouge, there is a continuing history of "bloc voting" under which when a black candidate opposes a white candidate, the white majority consistently casts its votes for the white candidate, irrespective of relative qualifications.

612 F.2d at 211.

any instance wherein the will of the majority is expressed by popular vote.

For the reasons set forth above, we reverse the judgment of the district court and remand for proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 87-3463

RONALD CHISOM, MARIE BOOKMAN, WALTER WILLARD, MARC MORIAL, LOUISIANA VOTER REGISTRATION/EDUCATION CRUSADE and HENRY A. DILLON, III,

Plaintiffs-Appellants,

versus

EDWIN EDWARDS, in his capacity as Governor of the State of Louisiana, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Louisiana

(May 27, 1988)

Before BROWN, JOHNSON, and HIGGINBOTHAM, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the Suggestion for Rehearing En Banc is DENIED. The Court further orders that the mandate shall issue forthwith.

ENTERED FOR THE COURT:

/s/ SAM D. JOHNSON
United States Circuit Judge

Ronald CHISOM, et al.

v.

Edwin EDWARDS, et al.

Civ. A. No. 86-4075.

United States District Court,
E.D. Louisiana.

May 1, 1987.

As Amended July 10, 1987.

Class action suit was filed on behalf of all blacks registered to vote in Louisiana parish, challenging process of electing Louisiana Supreme Court justices for particular district. Defendants moved to dismiss. The District Court, Charles Schwartz, Jr., J., held that: (1) judges were not "representatives" within meaning of § 2 of Voting Rights Act, and (2) complaint did not sufficiently allege intent to discriminate in violation of Fourteenth and Fifteenth Amendment.

Motion granted.

1. Elections 12(1)

Judges are not "representatives" within meaning of section of Voting Rights Act referring to right to elect representatives; by their very definition, judges do not represent voters but are appointed or elected to preside and to administer law. Voting Rights Act of 1965, § 2 et seq., 42 U.S.C.A. § 1973 et seq.

See publication Words and Phrases for other judicial constructions and definitions.

2. Civil Rights 13.12(3)

Elections 12(9)

Complaint lacked allegations required for claims of Fourteenth and Fifteenth Amendment violations from system of election of state Supreme Court justices, where it did not allege that system was instituted with specific intent to discriminate. U.S.C.A. Const.Amends. 14, 15.

William P. Quigley, Ron Wilson, Roy Rodney, New Orleans, La., C. Lani Guinier, Pamela S. Karlan, New York City, for plaintiffs.

William J. Guste, Jr., Atty. Gen. Eavelyn T. Brooks, Asst. Atty. Gen., Louisiana Dept. of Justice, M. Truman Woodward, Jr., Black (sic) G. Arata, A.R. Christovich, Moise W. Dennery, New Orleans, La., for defendants.

OPINION

CHARLES SCHWARTZ, Jr., District Judge.

This matter is before the Court on defendants' motion to dismiss for failure to state a claim upon which relief can be granted pursuant to F.R.Civ.P. 12(b)(6). For the foregoing reasons, defendants' motion is GRANTED.

FACTS AND ALLEGATIONS

Ronald Chisom, four other black plaintiffs and the Louisiana Voter Registration Education Crusade filed this class action suit on behalf of all blacks registered to vote in Orleans Parish. Plaintiffs' complaint challenges the process of electing Louisiana Supreme Court Justices from the First District of the State Supreme Court. The com-

plaint alleges that the system of electing two at-large Supreme Court Justices from the Parishes of Orleans, St. Bernard, Plaquemines and Jefferson violates the 1965 Voting Rights Act, as amended, 42 U.S.C. § 1973 et seq., the fourteenth and fifteenth amendments to the United States Federal Constitution and, finally, 42 U.S.C. § 1983. Plaintiffs argue that the election-system impermissibly dilutes, minimizes and cancels the voting strength of blacks who are registered to vote in Orleans Parish.

More specifically, plaintiffs' original and amended complaint avers that the First Supreme Court District of Louisiana contains approximately 1,102,253 residents of which 63.36%, or 698,418 are white, and 379,101, or 34.4% are black. The First Supreme Court District has 515,103 registered voters, of which 68% are white, and 31.61% are black. Plaintiffs contend that the First Supreme Court District of Louisiana should be divided into two single districts. Plaintiffs suggest that because Orleans Parish's present population is 555,515 persons, roughly half the present First Supreme Court District, the most logical division is to have Orleans Parish elect one Supreme Court Justice and the Parishes of Jefferson, St. Bernard and Plaquemine together elect the other Supreme Court Justice. If plaintiffs' plan were to be carried out, plaintiffs contend the present First Supreme Court District encompassing only Orleans Parish would then have a black population and voter registration comprising a majority of the district's population. More specifically, plaintiffs assert presently 124,881 of the registered voters in Orleans are white, comprising 47.9% of the plaintiffs' proposed district's voters; while 134,492 of the registered voters in Orleans are now black, comprising 51.6% of the

envisioned district's voters. The other district comprised of Jefferson, Plaquemines and St. Bernard parishes and would have a substantially greater white population than black, according to plaintiffs' plan.

Plaintiffs seek class certification of approximately 135,000 black residents of Orleans Parish, whom plaintiffs allege suffer from diluted voting strength as a result of the present at-large election system. Additionally, plaintiffs seek a preliminary and permanent injunction against the defendants restraining the further election of Justices for the First Supreme Court District until this Court makes a determination on the merits of plaintiffs' challenge. Further, plaintiffs seek an order requiring defendants to reapportion the First Louisiana Supreme Court in a manner which "fairly recognizes the voting strengths of minorities in the New Orleans area and completely remedies the present dilution of minority voting strength." (Plaintiffs' Complaint, p. 7). Plaintiffs also seek an order requiring compliance with the Voting Rights Act and, finally, a declaration from this Court that the Supreme Court election system violates the Voting Rights Act and the fourteenth and fifteenth amendments to the Federal Constitution.[1]

Defendants do not dispute the figures presented by plaintiffs in their amended complaint. Instead, they con-

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1. Plaintiffs, earlier, sought a three judge court to hear this complaint which was denied by this Court as the terms of 28 U.S.C. § 2284 provide for a three judge court when the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body is challenged. Nowhere does § 2284 provide for convening a three judge court when a judicial apportionment is challenged.

tend that section 2 of the Voting Rights Act of 1965, as amended, the fourteenth and fifteenth amendments to the United States Federal Constitution and 42 U.S.C. § 1983 fail to provide plaintiffs grounds upon which relief can be granted for plaintiffs' allegation of diluted black voting strength.

SECTION 2 OF THE VOTING RIGHTS ACT OF 1965 DOES NOT APPLY TO THE INSTANT ACTION

Prior to 1982, section 2 of the Voting Rights Act (42 U.S.C. § 1973), "Denial or Abridgement of Rights to Vote on Account of Race or Color Through Voting Qualifications or Prerequisites," read as follows:

> No voting qualification or prerequisite to voting, or standard, practice, or procedure, shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973(b)(f)(2) of this title.

Section 2 of the Voting Rights Act was amended as a response to *City of Mobile, Alabama v. Bolden,* 446 U.S. 55, 100 S.Ct. 1490, 64 L.Ed. 47 (1980), in which the Supreme Court in a plurality opinion held to establish a violation of section 2 of the Voting Rights Act, minority voters must prove the contested electoral mechanism was intentionally adopted or maintained by state officials for a discriminatory purpose. After *Bolden,* Congress in 1982 revised section 2 to make clear that a violation of the Voting Rights Act could be proven by showing a discriminatory effect or result alone. *United States v. Marengo County Commission,* 731 F.2d 1546 n. 1 (11th Cir. 1984), *appeal dismissed,*

cert. denied, 469 U.S. 976, 105 S.Ct. 375, 83 LEd.2d 311 (1984).[2] Section 2, as amended, 96 Stat. 134, now reads:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the rights of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2), as provided in subsection (b) of this section.
>
> (b) A violation of subsection (a) is established if, based on the totality of the circumstances, it is shown that the political processes leading to nomination for election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to *elect representatives of their choice.* The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, that nothing in this section establishes a right to have members of a protective class elected in numbers equal to their proportion in the population. 42 U.S.C. § 1973 (emphasis added).

Prior to the 1982 amendments to section 2, a three-judge court composed of Judges Ainsworth, West and Gordon, headed by Judge West, addressed a voting rights claim arising out of the same claims of discrimination as

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2. See S.Rep. 97-417, 97 Cong.2d Sess (1982) pp. 15-43, U.S. Code Cong. & Admin.News 1982, p. 177, for a complete discussion of Congress' intent to overturn the section 2 "purposeful discrimination" requirement imposed by *Mobile v. Bolden.*

in this case, albeit not in a section 2 context. *Wells v. Edwards*, 347 F.Supp. 453 (M.D.La.1972), *aff'd*, 409 U.S. 1095, 93 S.Ct. 904, 34 L.Ed.2d 679 (1973). In *Wells*, a registered black voter residing in Jefferson Parish, brought suit seeking a reapportionment of the judicial districts from which the seven judges of the Supreme Court of Louisiana are elected. Ms. Wells sought an injunction enjoining the state from holding the scheduled Supreme Court Justice elections and an order compelling the Louisiana Legislature to enact an apportionment plan in accordance with the "one man, one vote" principle and to reschedule the pending election. On cross motions for summary judgment, the three-judge court stated, "We hold that the concept of one-man, one vote apportionment does not apply to the judicial branch of government." 342 F.Supp. at 454. The *Wells* court took notice of *Hadley v. Junior College District*, 397 U.S. 50, 90 S.Ct. 791, 25 L.Ed.2d 45 (1970), in which the Supreme Court held, "Whenever a state or local government decides to select persons by popular election *to perform governmental functions*, the equal protection clause of the fourteenth amendment requires that each qualified voter must be given an equal opportunity to participate in that election. . . .", 90 S.Ct. 791, 795 (emphasis added), but distinguished its holding by outlining the special functions of judges.

The *Wells* court noted many courts' past delineations between elected officials who performed legislative or executive functions and judges who apply, but not create, law[3] and concluded:

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3. *See, e.g., Stokes v. Fortson*, 234 F.Supp. 575 (N.D.Ga.1964) ("Manifestly, judges and prosecutors are not representative

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> 'Judges do not represent people, they serve people.' Thus, the rationale behind the one-man, one-vote principle, which evolved out of efforts to preserve a truly representative form of government, is simply not relevant to the makeup of the judiciary.

347 F.Supp. at 455.

The *Wells* opinion interpreted the "one man one vote" principle prior to the 1982 amendments to section 2, which added the phrase, "[T]o elect representatives of their choice."[4] *See* emphasis in quotation 42 U.S.C. 1973, *supra.*) The legislative history of the 1982 Voting Rights Act amendments does not yield a definitive statement noting why the word "representative" was added to section 2. However, in this case, no such statement is necessary, as "to elect representatives of their choice" is clear and unambiguous.

[1] Judges, by their very definition, do not represent voters but are "appointed [or elected] to preside and to administer the law." *Black's Law Dictionary,* 1968. As statements by Hamilton in the *Federalist,* No. 78 reflect, the distinction between Judge and representative has long been established in American legal history:

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in the same sense as they are legislators or the executive. Their function is to administer the law, not to espouse a cause of a particular constituency"); *Holshouser v. Scott,* 335 F.Supp. 928 (D.D.C.1971) ("We hold that the one man, one vote rule does not apply to state judiciary. . . ."); *Buchanan v. Rhodes,* 249 F.Supp. 860 (N.D.Ohio1966) ("Judges do not represent people, they serve people"); *New York State Assn. of Trial Lawyers v. Rockefeller,* 267 F.Supp. 148, 153 (S.D.N.Y. 1967) ("The state judiciary, unlike the legislature, is not the organ responsible for achieving representative government.")

4. This language did not appear in section 2 at the time of the *Wells* opinion.

> If it be said that the legislative body are themselves the constitutional judges of their own powers, and that the construction they put upon them is conclusive upon the other departments, it may be answered, that this cannot be the natural presumption, where it is not to be collected from any particular provisions in the constitution. It is not otherwise to be supposed that the constitution could intend to enable the representatives of the people to substitute their will to that of their constituents. It is far more rational to suppose that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. . . .

Indeed, our Federal Constitution recognizes the inherent difference between representatives and judges by placing the federal judiciary in an entirely different category from that of other federal elective offices. It is noteworthy that articles 1 and 2, which establish Congress and the Presidency, are lengthy and detailed, while Article 3, which establishes the judiciary, is brief and free of direction, indicating the judiciary is to be free of any instructions. Today, Fifth Circuit jurisprudence continues to recognize the long established distinction between judges and other officials. *See, e.g., Morial v. Judiciary Committee of State of Louisiana*, 565 F.2d 295 (5th Cir.1977) *en banc, cert. denied*, 435 U.S. 1013, 98 S.Ct. 1887, 56 L.Ed. 2d 395 (1978). (See also Footnote 1, *supra.*)

The legislative history of the Voting Rights Act Amendments does not address the issue of section 2 apply-

ing to the judiciary,[5] indeed, most of the discussion concerning the application of the Voting Rights Act refers to legislative offices. Nevertheless plaintiffs ignore the historical distinction between representative and judge and the lack of any discernible legislative history in their favor and argue that the Voting Rights Act is a broad and remedial measure which must be extended to cover judicial election systems.[6] Plaintiffs rely principally on *Haith v. Mar-*

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5. The Chairman of the Senate Judiciary Committee's Subcommittee on the Constitution, Senator Orrin Hatch, in voicing his strong opposition of the Legislative reversal of *Bolden* through the section 2 revisions, made a brief reference to section 2 applying to judicial elections:

> Every political subdivision in the United States would be liable to have its electoral practices and procedures evaluated by the proposed results test of section 2. It is important to emphasize at the onset that for the purposes of Section 2, the term "political subdivision" encompasses all governmental units, including city and county councils, school boards, judicial districts, utility districts, as well as state legislatures.

S.Rep. 97-417, 97 Cong.2d Sess. 127, 151, *reprinted in* 1982 U.S.Code Cong. & Admin.News 298, 323.

Although Senator Hatch's comment indicates coverage of judicial districts by the Voting Rights Act, the purpose of the above passage was to illustrate Senator Hatch's belief that the impact of the section 2 Amendments' "results test" would be far ranging and in his opinion, detrimental. Senator Hatch's comments were included at the end of the Senate report usually reserved for dissenting Senators. The above passage did not portend to be a definative or even a moderately detailed description of the coverage of the Voting Rights Act, nor does Senator Hatch provide any authority for his suggestion of the potential scope of section 2. Rather, this Court finds that the passage was meant to be argumentative and persuasive, and not as a means to define actual scope of the Act.

6. *See e.g., United Jewish Organization of Williamsburg, Inc. v. Carey*, 430 U.S. 144, 97 S.Ct. 996, 51 L.Ed.2d 229 (1977)

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tin, 618 F.Supp. 410 (D.N.C.1985) (three-judge court), *aff'd*, without opinion, 106 S.Ct. 3268, 91 L.Ed.2d 559 (1986) for the proposition that this Court should ignore *Wells v. Edwards*, *supra*, and apply section 2 to the allegations contained in their complaint.[7] In *Haith*, the district court held that judicial election systems are covered by section 5 of the Voting Rights Act, which requires preclearance by the U.S. Justice Department of any voting procedures changes in areas with a history of voting discrimination. Plaintiffs, in essence, argue that because the Supreme Court, without opinion, affirmed the *Haith* district court in its application of section 5 to judicial elections, this Court should expand the holding of *Haith* to include section 2 of the Voting Rights Act. Plaintiffs' argument fails because section 5 does not specifically restrict its application to election systems pertaining to representatives, a restriction included in the 1982 amendments to section 2.

Although a potential conflict may develop between the holdings in *Wells* and *Haith*, *Wells* clearly states the "one

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("It is apparent from the face of the Act, from its legislative history, and from our cases of the Act itself was broadly remedial in the sense that it 'was designed by Congress to banish the blight of racial discrimination in voting . . .' "), 430 U.S. at 156, 97 S.Ct. at 1005; *South Carolina v. Katzenback*, 383 U.S. 301, 86 S.Ct. 803, 15 L.Ed.2d 769 (1966) (The Voting Rights Act "reflects Congress' firm intention to rid the country of racial discrimination in voting"), 383 U.S. at 315, 86 S.Ct. at 811.

7. Plaintiffs also rely on *Kirksey v. Allian*, 658 F.Supp. 1153 (S.D.Ms.1987), in which a district court dismissed the reasoning in *Wells*, and held section 2 does apply to the elected judiciary. *Wells*, *supra*, has precedential authority and clearly conflicts with *Kirksey*, an untested lower court opinion.

man one vote" principle is *not* applicable to judicial elections. This Court recognizes the long standing principle that the judiciary, on all levels, exists to interpret and apply the laws, that is, judge the applicability of laws in specific instances. Representatives of the people, on the other hand, write laws to encompass a wide range of situations. Therefore, decisions by representatives must occur in an environment which takes into account public opinion so that laws promulgated reflect the values of the represented society, as a whole. Judicial decisions which involve the individual or individuals must occur in an environment of impartiality so that courts render judgments which reflect the particular facts and circumstances of distinct cases, and not the sweeping and sometimes undisciplined winds of public opinion.

PLAINTIFFS' FOURTEENTH AND FIFTEENTH AMENDMENT CLAIMS FAIL TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED AS PLAINTIFFS DO NOT PLEAD DISCRIMINATORY INTENT

The appropriate constitutional standard for establishing a violation of the fourteenth amendment in the context of voting rights is "purposeful discrimination." *Village of Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977);[8] *McMillian v. Escambia City, Fla.*, 688 F.2d 960 (5th Cir.

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8. In *Village of Arlington Heights v. Metropolitan Housing Corp.*, purposeful discrimination was held the standard necessary to establish a violation of the fourteenth amendment where plaintiff claimed a village rezoning decision was racially discriminatory.

1982).[9] Similarly, *City of Mobile, Alabama v. Bolden, supra,* requires a court to establish a finding of discriminatory purpose before declaring a fifteenth amendment violation of voting rights.[10]

In *Voter Information Project,* 612 F.2d 208 (5th Cir. 1980), a panel composed of Judges Jones, Brown and Rubin (opinion by Judge Brown) held a suit that alleged the at-large scheme for electing city judges in Baton Rouge invidiously diluted the voting strength of black persons in violation of the fourteenth and fifteenth amendments to

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9. In *McMillian v. Escambia City, Fla.,* the Fifth Circuit held the *Arlington Heights'* "purposeful discrimination" standard is appropriate in fourteenth amendment voter discrimination claims.

10. Although there is a conflict between the requirement of "discriminatory effect" in Section 2, which is intended to enforce the fifteenth amendment, and the requirement of "purposeful discrimination" for a fifteenth amendment violation standing alone, the Senate Judiciary Committee addressed this point and recognized Congress' limited ability to adjust the burden of proving Voting Rights Violations in its "Voting Rights Act Extension" Committee Report.

> Certainly, Congress cannot overturn a substantive interpretation of the Constitution by the Supreme Court. Such rulings can only be altered under our form of government by constitutional amendment or by a subsequent decision by the Supreme Court.
>
> Thus Congress cannot alter the judicial interpretations in *Bolden* of the fourteenth and fifteenth amendments by simple statute. But the proposed amendment to Section 2 does not seek to reverse the court's constitutional interpretation.

S.Rep. 97-417, 97 Cong.2d Sess. (1982), p. 41, U.S.Code Cong. & Admin.News 1982, p. 219. The Supreme Court, the only body empowered to interpret the Federal Constitution, has not seen fit to overrule its repeated determination that the fourteenth and fifteenth amendments claims require "purposeful discrimination."

the United States Federal Constitution, and 42 U.S.C. § 1983, could not be dismissed when the complaint alleges purposeful discrimination. At the trial level, Judge West relied on his reasoning in *Wells, supra,* that the one man, one vote principle did not apply to the elections of judges, and dismissed plaintiffs' suit. Judge Brown reversed, holding that the "one man, one vote" principle as espoused in *Wells, supra,* was not enough to dismiss plaintiff's complaint. The *Voter Information Court* found:

> The problem with the District Court's opinion, however, is that it assumes the "one man, one vote" principle was the exclusive theory of plaintiff's complaints. In addition to a rather vaguely formulated "one man, one vote" theory, plaintiffs contend that both in design and operation, the at-large schemes dilute the voting strength of black citizens and prevent blacks from being elected as judges. As the complaint attacking the city judge election system alleges:
>
> > 25. The sole purpose of the present at-large system of election of City Judge is to insure that the white majority will continue to elect all white persons for the offices of City Judge.
> >
> > 26. The present at-large system was instituted when "Division B" was created as a reaction to increasing black voter registration and for the express purpose of diluting and minimizing the effect of the increased black vote.
> >
> > 27. In Baton Rouge, there is a continuing history of "bloc voting" under which when a black candidate opposes a white candidate, the white majority consistently casts its votes for the white candidate, irrespective of the relative qualifications.
>
> Plaintiffs contend that since most of the black population of Baton Rouge and E. Baton Rouge Parish is concentrated in a few geographic areas, black citizens

> could, under a single member district plan, elect at least some black judges.

612 F.2d at 211.

The *Voter Information Project* Court held the plaintiff's complaint contained sufficient allegations of intentional discrimination against black voters to survive a motion to dismiss: "If plaintiffs can prove that the purpose and operative effect of such purpose of the at-large election schemes in Baton Rouge is to dilute the voting strength of black citizens, then they are entitled to some form of relief." 612 F.2d at 212. Thus, the *Voter Information Project* requires that "purpose and operative effect" be pled in a fourteenth and fifteenth amendment challenge to a judicial apportionment plan.

[2] The complaint in the instant case states, in pertinent part:

> Because of the official history of racial discrimination in Louisiana's First Supreme Court District, the wide spread prevalence of racially polarized voting in the district, the continuing effects of past discrimination on the plaintiffs, the small percentage of minorities elected to public office in the area, the absence of any black elected to the Louisiana Supreme Court from the First District, and the lack of any justifiable reason to continue the practice of electing two Justices at-large from the New Orleans area only, plaintiffs contend that the current election procedures for selecting Supreme Court justices from the New Orleans area dilutes minority voting strength and therefore violates the 1965 Voting Rights Act, as amended.

(See Plaintiffs' Complaint, p. 5). Later on, the Complaint alleges:

> The defendants' actions are in violation of the Fourteenth and Fifteenth Amendment to the United States Constitution and 42 U.S.C. § 1983 in that the purpose and effect of their actions is to dilute, minimize, and cancel the voting strength of the plaintiffs.

(*Id.*, p. 6.)

Although "purpose and effect" language in the second quotation above broadly read may imply plaintiffs' intention to plead discriminatory intent, it is this Court's considered opinion, based on the complaint as a whole, that plaintiffs intend to prove this claim based on a theory of "discriminatory effect" and not on a theory of "discriminatory intent." *City of Mobile Alabama v. Bolden, supra.* For example, plaintiffs' complaint does not allege the system by which the Louisiana Supreme Court Justices are elected was instituted with specific intent to discriminate. This contrasts with the specific allegations in *Voter Information Project, supra.* Accordingly, plaintiffs lack the requisite allegations in order to prove a violation of the fourteenth or fifteenth amendment to the Federal Constitution. The Court reserves the right for plaintiffs to reurge its fourteenth and fifteenth amendment claims as they relate to the Court's ruling that plaintiffs' complaint only alleges "discriminatory effect."

Accordingly, unless plaintiffs' complaint is amended within ten (10) days of the date of entry of this opinion, the Clerk of Court is directed to enter judgment DISMISSING plaintiffs' claim at their cost.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 88-3492

RONALD CHISOM, ET AL.,

Plaintiffs-Appellees,

versus

BUDDY ROEMER, ET AL.,

Defendants-Appellants.

Appeal from the United States District Court
for the Eastern District of Louisiana

(August 19, 1988)

Before CLARK, Chief Judge, GARZA and POLITZ, Circuit Judges.

POLITZ, Circuit Judge:

On August 3, 1988, following an expedited appeal, we vacated the preliminary injunction issued by the district court which had enjoined the election of a justice of the Louisiana Supreme Court from the First Supreme Court District, and ordered that "said election shall be conducted in accordance with the laws of the State of Louisiana at the times and in the manner specified therein." Consistent with a reservation then made, we now assign our reasons for that decision.

Background

On September 19, 1986 complainants, black registered voters in Orleans Parish, Louisiana, and an organization active in voting-rights issues, filed the instant suit, alleging that the present system of electing two justices to the Louisiana Supreme Court from the First Supreme Court District violates section 2 of the Voting Rights Act of 1965 as amended.[1] Their complaint was met with a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure, which the court granted, essentially based on the conclusion that section 2 did not apply to judicial elections.[2] On appeal we reversed and remanded.[3]

After an application for panel rehearing and for a rehearing en banc was declined, the case was returned to the district court. Thereafter, complainants applied for a preliminary injunction to prevent the election scheduled for October 1, 1988 of a justice from the First Supreme Court District, a position held by Justice Pascal F. Calogero, Jr. since 1972.[4] Based on the evidence presented[5]

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1. 42 U.S.C. § 1973, as amended June 29, 1982, 96 Stat. 134. The complaint also alleges violations of the fourteenth and fifteenth amendments but only section 2 of the Voting Rights Act is involved in the preliminary injunction.

2. 659 F.Supp. 183 (E.D.La. 1987). The court dismissed the constitutional claims for failure of allegations of discriminatory intent.

3. 839 F.2d 1056 (5th Cir. 1988). All claims were reinstated.

4. Justice Calogero is the ranking Supreme Court justice, in terms of service, second only to Chief Justice John A. Dixon, Jr.

5. As observed by a member of this panel during oral argument, defendants made little attempt to offer evidence or other

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the district judge concluded that the election should be enjoined. Defendants appealed and sought a stay pending appeal, Fed.R.App.P. 8. A divided motions panel of this court expedited the appeal and stayed the injunction to the extent it related to the qualifying activities of candidates. As noted, after hearing the expedited appeal this merits panel vacated the remainder of the preliminary injunction.

Factual Context

The thoughtful and comprehensive opinion of the trial court, which gleans the sparse record and reaches out and takes judicial notice of other relevant judicially-found facts,[6] reveals the following scenario.

The Supreme Court of Louisiana is composed of "a chief justice and six associate justices, four of whom must concur to render judgment," who are elected for ten-year terms.[7] The justices are elected from six Supreme Court districts, all of which are single-member districts except the First Supreme Court District which elects two justices,[8] a tradition dating back more than a century. The

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assistance to the trial court's efforts to decide the very difficult and serious issues presented by the application for a preliminary injunction.

6. Notably, the congressional redistricting case involving New Orleans and environs, brought pursuant to section 2 of the Voting Rights Act of 1965 as amended, Major v. Treen, 574 F.Supp. 325 (E.D.La. 1983) (three-judge court), a case in which a great volume of evidence, vigorously tested by the adversarial process, was presented to the court.

7. La. Const. of 1974, Art. 5, § 3.

8. La. Const. of 1974, Art. 5, § 4 (incorporating La. Const. of 1921, Art. 7, § 9); La. R.S. 13:101.

districts and the number of justices assigned to each are "subject to change by law enacted by two-thirds of the elected members of each house of the legislature."[9]

The First Supreme Court District is largely composed of the metropolitan New Orleans area and includes four parishes: Orleans, Jefferson, St. Bernard, and Plaquemines. This district is the largest in population, with a 1980 census total of 1,102,253. The next largest Supreme Court district has a 1980 census population of just over 861,000, while the smallest contains approximately 411,000 Louisianans. The average of the five other districts, using 1980 census figures, is 620,729.

In 1980, the most recent data available to the trial court, the four parishes in the First Supreme Court District had the following population distribution:

Orleans	557,515	(55.25% black)
Jefferson	454,592	(13.89% black)
St. Bernard	64,097	(3.73% black)
Plaquemines	26,049	(21.12% black)

Voter registration data as of March 31, 1987 reflected the following totals and percentages of black voters:

Orleans	251,359	(52.4% black)
Jefferson	199,534	(11.9% black)
St. Bernard	40,086	(3.9% black)
Plaquemines	15,198	(18.6% black)

As the trial court found, at present blacks comprise a majority of the total population, the voting-age population, and the registered voters in Orleans Parish. Orleans

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9. La. Const. of 1974, Art. 5, § 4.

Parish constitutes just over one-half of the total population of the First Supreme Court District.

The trial court concluded that complainants had satisfied the tetrad test for issuance of a preliminary injunction which was synthesized, although not originated, in the oft-cited case of *Canal Authority of Florida v. Callaway,* 489 F.2d 567, 572 (5th Cir. 1974), by showing:

(1) a substantial likelihood that plaintiff will prevail on the merits;

(2) a substantial threat that plaintiff will suffer irreparable injury if the injunction is not granted;

(3) that the threatened injury to plaintiff outweighs the threatened harm the injunction may do to defendant; and

(4) that granting the preliminary injunction will not disserve the public interest.

Analysis

Inasmuch as our decision is powered by a consideration of the essence and ramifications of the third and fourth factors, we pretermit a discussion of the first two, except for these limited comments. It remains to be seen whether the complainants will prevail on the merits, indeed the Supreme Court has yet to speak on the critical issue whether section 2 of the Voting Rights Act applies to judicial elections. And we can only speculate as to the state of the record in this case after trial on the merits.

As to irreparable injury, complainants urge a black-letter, *per se* rule to the effect that if an electoral standard, practice, or procedure abridges section 2 of the Voting Rights Act it automatically does irreparable injury to

all or a portion of the body politic. Some district courts would agree. *See Dillard v. Crenshaw County,* 640 F.Supp. 1347 (M.D.Ala. 1986); *Harris v. Graddick,* 593 F.Supp. 128 (M.D.Ala. 1984); *Cook v. Luckett,* 575 F.Supp. 479 (S.D.Miss. 1983). We do not. We are not prepared to adopt a *per se* rule in such a vital area of state-federal relations. While we recognize and are in full accord with the teachings of the Supreme Court in *Reynolds v. Sims,* 377 U.S. 533, 555 (1964), that "[t]he right to vote freely for the candidate of one's choice is of the essence of a democratic society and any restrictions on that right strike at the heart of representative government. And the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise." We are also cognizant that " '[t]he possibility that . . . other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.' " *Sampson v. Murray,* 415 U.S. 61, 70, 945 S.Ct. 937, 39 L.Ed.2d 166 (1974) (*quoting Virginia Petroleum Jobbers Assn. v. FPC,* 104 U.S.App.D.C. 106, 110, 259 F.2d 921, 925 (1958)). In this we agree with the commentators who suggest that "[o]nly when the threatened harm would impair the court's ability to grant an effective remedy is there really a need for preliminary relief." Wright, Miller & Kane, *Federal Practice and Procedure* § 2948 at 431-34 (1973).

Should the election be enjoined?

Assuming *per arguendo* that there has been a prima facie showing of likelihood of success on the merits, and irreparable injury, our disposition of this appeal turns on

a negative response to the question: Does the public interest require that this election be enjoined? Would such an injunction be in the best interests of: all of the citizens of the State of Louisiana; the citizens of the First Supreme Court District; the black citizenry of Louisiana; that of the First Supreme Court District; or the black electorate of Orleans Parish? We are persuaded beyond peradventure that the answer must be a resounding "no" on behalf of all of these groupings of Louisianians.

Our analysis begins with the staunch admonition that a federal court should jealously guard and sparingly use its awesome powers to ignore or brush aside long-standing state constitutional provisions, statutes, and practices. There can be no doubt that under the Supremacy Clause,[10] federal courts do and indeed must have this authority in our unique form of government. It is the use of this power that must be maintained in the balance, a balance which is more delicate than usual when a state's judicial process is involved.

It cannot be gainsaid that federal courts have the power to enjoin state elections. *Watson v. Commissioner's Court of Harrison County,* 616 F.2d 105 (5th Cir. 1980); *Hamer v. Campbell,* 358 F.2d 215 (5th Cir.), *cert. denied,* 385 U.S. 851 (1966). But, "intervention by the federal courts in state elections has always been a serious business," *Oden v. Brittain,* 396 U.S. 1210 (1969) (Black, J., opinion in chambers), not to be lightly engaged in. Indeed, even after an adjudication on the merits that a legislative apportionment plan violated the Constitution, the Supreme Court invited the use of a velvet glove over the mailed fist:

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10. Constitution, Art. VI.

> In awarding or withholding immediate relief, a court is entitled to and should consider the proximity of a forthcoming election and the mechanics and complexities of state election laws, and should act and rely upon general equitable principles. With respect to the timing of relief, a court can reasonably endeavor to avoid a disruption of the election process which might result from requiring precipitate changes that could make unreasonable or embarrassing demands on a State in adjusting to the requirements of the court's decree.

Reynolds v. Sims, 377 U.S. at 5850. *Sims* has been the guidon to a number of courts that have refrained from enjoining impending elections. In another instance, the Supreme Court stayed a district court's hand after a three-judge court found Indiana's multi-member districting provisions unconstitutional. *Whitcomb v. Chavis,* 396 U.S. 1055 and 396 U.S. 1064 (1970) (granting a stay pending appeal, 305 F.Supp. 1359, 1364 (S.D.Ind. 1969)). *See also Maryland Citizens v. Governor of Maryland,* 429 F.2d 606 (4th Cir. 1970); *Dillard v. Crenshaw County; Banks v. Bd. of Ed., City of Peoria,* 659 F.Supp. 394 (C.D.Ill. 1987); *Knox v. Milwaukee County,* 581 F.Supp. 399 (E.D.Wis. 1984).

We consider significant the Supreme Court's action in *Chavis.* In staying the reapportionment plan ordered by a three-judge court, the Supreme Court permitted the conduct of an election under the old scheme which had been found constitutionally infirm. In dissenting from the refusal to vacate their stay order, Justice Douglas pointedly stated: "The State contends that without a stay it will be forced to conduct the forthcoming election under the reapportionment plan of the District Court. By granting

the stay, however, this Court has equally forced the appellees to go through the election under the present scheme which was held unconstitutional by the District Court." 396 U.S. 1064. Nonetheless the court permitted the election to proceed.

The case at bar

Against this backdrop we consider the realities of the case at bar. The district court concluded that the issuance of an injunction would either be neutral, in ultimate result, or preferable to not enjoining the election. We do not find the court's reasoning persuasive. To the extent this is a factual finding by the trial court, we view it as clearly erroneous; to the extent it is a conclusion of law, we view it as erroneous.

Preventing this judicial election at this late stage is not a passive or neutral act. It is the proverbial gossamer-thin veil which is fraught with difficulties. The consequences to Louisiana's judicial system are as significant as they are uncertain. Indeed, the very uncertainties introduced account in large measure for the significance of the impact.

The core value of the law and its implementing judicial system is stability—the ability reasonably to anticipate the results of actions and proceedings, by individuals and by legal institutions. Staying the election for a justice of the First Supreme Court District casts a cloud over the Louisiana Supreme Court, as staying any judicial election would cast a cloud over the affected court. The Louisiana Constitution provides that the terms of the justices of its supreme court are ten years. The term of Justice Calogero expires on December 31, 1988. If the

regularly scheduled election did not go forward, would Louisiana have seven justices on its highest court on January 1, 1989? If the election is enjoined and Justice Calogero continues to serve, will there be any question about the validity of his actions as a justice?

The Louisiana Constitution prescribes that four justices must concur to render judgment. Decisions in both civil and criminal cases decided on a 4-3 basis are not a rarity. The sparse offerings by the state in defense of the application for the preliminary injunction include the affidavit of the Director of the Louisiana Supreme Court's Central Staff of attorneys. He advises that since 1976 the Louisiana Supreme Court has reviewed 82 death penalty appeals. In 30 of those appeals the conviction was reversed or the death sentence was vacated. Twenty percent of those reversals were decided on a 4-3 vote. The record does not contain statistics for 4-3 renditions in civil cases, or in the denial of writs of certiorari or review, which require the agreement of four justices,[11] but the number undoubtedly is very substantial. One need only thumb through a selective sampling of the Southern Reporter Second series for a feel of just how substantial that number is. What is the consequence if Justice Calogero is one of the four? Is an uncertainty introduced?

Does the general statutory provision declaring that public officers hold their offices until their successors are

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11. La. Const. of 1974, Art. 5, § 3.

"inducted into office"[12] apply in this instance? Our research reflects no case in which the Louisiana Supreme Court has applied this statute to a justice or judge. Until Louisiana's highest court resolves this question it remains just that, an open question and, as such, it casts a shadow on the functioning of the Louisiana Supreme Court.

Appellees and the trial court refer to the provision of the Louisiana Constitution which addresses the temporary posting of judicial vacancies. Article 5, § 22, provides that until a vacancy in a judicial office is filled "the supreme court shall appoint a person meeting the qualifications for the office . . . to serve at its pleasure. The appointee shall be ineligible as a candidate at the election to fill the vacancy." *Id.* § 22(B). If the election is enjoined, after midnight on December 31, 1988 is the post now held by Justice Calogero to be deemed vacant and subject to an appointment by his former-fellow justices? Because of the involvement of the federal court, and its preventing of the election, would this be a vacancy subject to appointment? If it is deemed such and Justice Calogero accepts an appointment, would he be eligible to seek reelection to the judicial post he has held since 1972 when the federal court did permit an election to proceed? More shadows on the otherwise clear patina of the Louisiana judicial system. Are such warranted? Can they be justified or permitted?

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12. La. R.S. 42:2 provides:

> Every public officer in this state except in case of impeachment or suspension, shall continue to discharge the duties of his office until his successor is inducted into office.

Further, in Article 5, § 6, the Louisiana Constitution establishes that "[t]he judge oldest in point of service on the supreme court shall be chief justice." Justice Calogero currently is second in point of service to the chief justice. If the election is enjoined and his office is deemed vacant, should he not be offered, or should he decline an appointment out of caution for the Article 5, § 22(B) proscription; if he is reelected, would his service have been interrupted so as to cause a forfeiture of his claim to be oldest in point of service?

Finally, what about the litigants during this period? What will be the racial demographics of that group? Will they be affected adversely? Will that effect be significant? Can it be justified?

Appellees suggest that the specter of problems with and for the Louisiana Supreme Court are manageable. The trial court states: "Regardless of the state constitutional provisions, this Court has in any event the power under the Supremacy Cause to fashion both preliminary and final equitable relief that will both provide plaintiffs with a full and adequate remedy and protect other important state interests."[2] Is this a suggestion that the chancellor will appoint a successor to Calogero, perhaps Calogero, and, out of a sense of fair play, decree that all state constitutional questions as to his service are to be taken for naught, that the proscription against his running for the office is nullified, and, further, order that no one may suggest a break in his service for purposes of eligibility for the office of chief justice? Is such necessary? Should the federal court even contemplate that scenario? We are most reluctant to do so.

Were we to countenance such a scenario, other interests would be disserved. As the *Dillard* court recognized, the extension of the terms of incumbents or the court's appointment of replacements, effectively denies "the entire electorate the right to vote and thus seem to offend basic principles. . . ." *Dillard,* 640 F.Supp. at 1363. *See also, Banks,* 659 F.Supp. at 402 ("enjoining the . . . election would have the effect of preventing all of the voters in the respective election districts from exercising their right to vote. . . .").

How long would this disenfranchisement of all of the voters of the First Supreme Court District continue? As discussed *infra,* this case must run its full course, and, thereafter, assuming violations are found, the Louisiana Legislature must be afforded an opportunity to repair the defects the court discloses. Is the electorate to have no say whatever as to the person to serve during that period? Can that conceivably be considered in the best interests of the citizenry?

In addition to the foregoing caution to the use of injunctive powers before trial on the merits, and indeed even after trial on the merits, we are also keenly mindful of another well-established rubric which must be brought to bear in the resolution of the present conundrum. It is now established beyond challenge that upon finding a particular standard, practice, or procedure to be contrary to either a federal constitutional or statutory requirement, the federal court must grant the appropriate state or local authorities an opportunity to correct the deficiencies. In *Reynolds v. Sims* the Supreme Court commended the district court for refraining from enjoining an impending

election until the Alabama Legislature had been given an opportunity to remedy the defects in their legislative apportionment scheme. 377 U.S. at 586. Further, after trial on the merits, and a declaration that an existing election scheme is unlawful, it is "appropriate, whenever practicable, to afford a reasonable opportunity for the legislature to meet constitutional [or federal statutory] requirements by adopting a substitute measure rather than for the federal court to devise and order into effect its own plan." *Wise v. Lipscomb*, 437 U.S. at 540. *See also McDaniel v. Sanchez*, 452 U.S. 130, 150 n.30 (1981) ("Moreover, even after a federal court has found a districting plan unconstitutional, 'redistricting and reapportioning legislative bodies is a legislative task which the federal courts should make every effort not to preempt,'" *quoting Wise v. Lipscomb*). The court goes on to cite authorities for the proposition that the legislatures should first be given a chance, and quoting *Reynolds v. Sims*, the *Sanchez* court noted that "judicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do so." 452 U.S. at 150 n.30); *Connor v. Finch*, 431 U.S. 407 (1977); *Major v. Treen*.

As found by the district court, the Louisiana Legislature has signaled no reluctance to address this matter. When this court held that section 2 applied to judicial elections, remedial legislation was offered and seriously considered in the just-recessed legislative session. This legislature gives every indication of promptly responding to a need for action should it occur.

We understand these precedents to mandate that the responsible state or local authorities must be first given an opportunity to correct any constitutional or statutory defect before the court attempts to draft a remedial plan. In the case at bar, that means that should the court rule on the merits that a statutory or constitutional violation exists the Louisiana Legislature should be allowed a reasonable opportunity to address the problem. We have no reason whatsoever to doubt that the governor and legislature will respond promptly. Such was the experience in the epilogue to *Major v. Treen.*

In the interim, we are convinced that the system in place for the election of the subject judicial officer should be left undisturbed. There are a number of variables and several contingencies. But notwithstanding their final alignment, at the appropriate time, should it become necessary, the federal courts may fashion whatever remedy the law, equity, and justice require.

The preliminary injunction is VACATED and it is ordered that the presently scheduled election for justice of the First Supreme Court District of Louisiana proceed in accordance with the laws of Louisiana.